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Supreme Court, U.S.
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In The

Supreme Court of the United States

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ROBERT LEE FREEMAN,

Petitioner,

v.

MAGGIE MILLER-STOUT,

Respondent.

◆

On Petition For Writ Of Certiorari
To The Supreme Court Of Washington

◆

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether Ninth Circuit holdings related to partial courtroom closures have resulted in lower court disregard for constitutional requirements of the public trial right as guaranteed by the First, Sixth and Fourteenth Amendments.

LIST OF PARTIES

Petitioner:	Robert Lee Freeman
Respondent:	Maggie Miller-Stout

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OPINIONS BELOW

Following a jury trial in 2003, Petitioner Robert Lee Freeman was convicted of one count of each of the following: rape of a child in the first, second, and third degree, and child molestation in the first, second, and third degree.

While pending sentencing, new counsel brought an unsuccessful motion before the trial court alleging ineffective assistance of trial counsel.

On appeal, several issues were brought before Division I of the Washington Court of Appeals. One issue was the denial of a public trial. The matter was brought before the court in a supplemental memorandum immediately following a newly published decision relevant to the public trial issue. The Court of Appeals declared the matter untimely. Mr. Freeman filed a Petition for Review to the Washington Supreme Court, which was denied by order in 2005.

Mr. Freeman next sought collateral review, filing a Personal Restraint Petition in the Washington Court of Appeals. That Petition was denied in 2007, and Petitioner's Motion for Discretionary Review and Motion to Modify were both denied by the Washington Supreme Court in 2007 as well. However, both courts reached the merits of the public trial claim before denying relief.

Upon Habeas Corpus application by Petitioner, the United States District Court for the Western District of Washington directed its clerk to serve the matter on respondent and directed that respondent answer the petition. The U.S. District Court, the Honorable Richard A. Jones, ultimately adopted the commissioner's Report and Recommendation. This resulted in an order denying the habeas petition and dismissing the matter with prejudice, as well as denying Petitioner's motion requesting record expansion on the public trial issue.

Both the United States District Court and the Ninth Circuit Court of Appeals denied Petitioner's Motions for Certificate of Appealability. The Ninth Circuit also denied Petitioner's Motion for Reconsideration.

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JURISDICTION

The Ninth Circuit Court of Appeals denied Petitioner's Motion for Appealability as well as Petitioner's Motion for Reconsideration. Because Petitioner exhausted all possible review below, and because his complaints are based in the United States Constitution, the United States Supreme Court has jurisdiction to hear this case under 28 U.S.C. § 1254(1), following judgment or decree by the Ninth Circuit Court of Appeals. This matter is timely brought to this Court.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A. U.S. Const., amend. I, which provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

B. U.S. Const., amend. VI, which provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

C. U.S. Const., amend. XIV, which provides:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life,

> liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

D. Washington Const., art. 1, § 22, which provides:

> In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: *Provided,* The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station or depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

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STATEMENT OF THE CASE

The United States District Court for the Western District of Washington denied Robert Lee Freeman's Petition for Habeas Corpus regarding his Washington State court conviction and incarceration for six child sex crimes. Petitioner asserts the Ninth Circuit Court of Appeals erred when it denied Petitioner's Motion for Appealability and subsequent Motion for Reconsideration. Because thus far reviewing courts' opinions have upheld the unconstitutional violation of Petitioner's and the general public's right to a public trial, Petitioner brings this Petition seeking certiorari.

A. Procedural History

On March 14, 2002, the State of Washington charged Petitioner Robert Freeman with four counts of rape of a child in the first degree. CP 1-6.[1] Petitioner pleaded not guilty and the State's case against him proceeded to trial. Just before trial, the State amended the information and charged Petitioner with one count each of rape of a child in the first, second, and third degrees, and one count each of child molestation in the first, second, and third degrees. App. 10-11.

The matter proceeded to trial on March 18, 2003. App. 11. Mr. Freeman was found guilty as charged.

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[1] CP refers to the Clerk's Papers (selected trial court documents) in the State appellate courts.

CP 131-36. Prior to sentencing, Mr. Freeman retained new counsel who substituted in for purposes of conducting a post-trial motion and hearing alleging trial counsel's ineffectiveness. After a hearing, the trial court denied the motion. CP 188-89.

On September 12, 2003, Mr. Freeman was sentenced. He was ordered to serve a term of confinement of 280 months in the custody of Washington's Department of Corrections. CP 168.

On October 9, 2003, Mr. Freeman timely appealed his conviction to the Washington Court of Appeals, Division I. App. 14. Appellate counsel submitted supplemental briefing to the Court of Appeals. The Court of Appeals denied the supplemental filing. App. 14. The court's subsequent decision on January 24, 2005, affirmed Petitioner's convictions. App. 14.

Petitioner's subsequent Motion for Discretionary Review to the Washington Supreme Court was denied on November 2, 2005, as was his Motion to Modify. App. 14.

Petitioner filed a Personal Restraint Petition on June 26, 2006. The Court of Appeals dismissed the Personal Restraint Petition on March 26, 2007. Subsequently, Petitioner's Petition for Discretionary Review and Motion to Modify were denied as well. App. 15.

On November 6, 2007, Petitioner timely filed his Petition for Habeas Corpus. App. 15. United States Magistrate Judge James P. Donohue's written Report and Recommendation recommended Mr. Freeman's petition be denied and the case dismissed with prejudice. Petitioner's motion for an evidentiary hearing and motion to expand the record to include evidence of public trial deprivation during voir dire was denied in that pleading as well. App. 36.

Petitioner filed his objections to the Report and Recommendation. App. 88. United States District Court Judge Richard A. Jones ordered the adoption of the Report and Recommendation, thus denying the Habeas petition. Petitioner asked both the District Court and the Ninth Circuit to find his case appealable. Following a Motion to Reconsider, they still did not find his case appealable.

This Petition for Writ of Certiorari properly follows.

B. Statement of Facts

Robert Lee Freeman was convicted of several child rape and child molestation allegations, all related to claims made by his stepdaughter, Amie Freeman. App. 11, 13. Amie claimed that over the course of approximately ten years, Mr. Freeman entered her bedroom, rubbed her body, and at times she was digitally penetrated while he masturbated. App. 11-12.

In sum, the trial testimony included the following. Once Amie's mother (Petitioner's then-wife, Virginia Freeman) reported the above allegations to the authorities in 2001, a King County Detective investigated the case. RP 314,[2] App. 13. The detective interviewed the then 20-year-old college student, Amie Freeman. She collected carpet samples, statements from Amie's mother, Virginia, as well as a denial statement by Mr. Freeman, the Petitioner. The DNA collected from the carpet samples was shown to be Petitioner's. However, Petitioner gave exculpatory testimony to the DNA locations. App. 27.

During the course of trial, observers were required to leave the courtroom on two occasions. Petitioner raised this as a violation of his right to a public trial. App. 32. However, the courts have thus far only considered the latter of the two occasions of removal, denying relief after reaching its merits. App. 17, 33.

The first occasion of spectator removal occurred during voir dire and was addressed for the first time in Petitioner's counsel's memorandum supplementing Petitioner's original Habeas Pro Se Memorandum in support of his Petition for Habeas Corpus. App. 97-98.

The second occasion involved the court ordering Petitioner's fiancée, Aria Rozotti, removed from observing the testimony of Petitioner's former wife. App. 32-33.

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[2] RP refers to Report of Proceedings (trial transcript) in the State appellate courts.

As previously indicated, the District Court considered the transcript of the pre-trial motion related to the decision to partially close the courtroom to Ms. Rozotti. Its specific dialogue reference is critical for this court's consideration because it clarifies the absence of any weighing of alternatives by the trial judge or entering of oral findings. In relevant part, the following occurred upon the prosecutor's request to partially close the court,

> MR. COLASURDO: . . . The other thing is – there's two other things. The State would ask that during the testimony of Virginia Freeman and Amie Freeman that Ms. Aria Rozotti be excused. . . .

App. 43.[3]

After Ms. Rozotti was identified, the prosecutor proceeded as follows,

> So, in fairness to the two witnesses who do have an anti-harassment order, I would ask that she be excluded during their testimony.

App. 43. The dialogue continued.

> THE COURT: Any objection?
>
> MR. FREEBORN: Your Honor, I mean, I don't think it's really relevant to this matter. However, you know, in the interest of just getting this thing running through smoothly,

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[3] This excerpt was the only supplemental material reviewed by the District Court on the public trial issue. *See* App. 32.

> I don't have a problem with her stepping out for that testimony.
>
> THE COURT: All right. I will grant the motion.

App. 44.

The trial court never took a closer look at the issue; it never made a record of considering reasonable alternatives to closing the proceeding, and it never made findings to support such consideration.

Despite its reliance on the above record, the District Court's Report and Recommendation erroneously found the following,

> . . . Aria Rozotti (now Freeman) was excluded from the courtroom during Virginia's and Amie's testimony. The prosecutor moved to have Aria temporarily excluded because an anti-harassment order was in place *prohibiting Aria from having contact*[4] with Virginia and Amie. . . . The trial court asked defense counsel if there were any objections, to which defense counsel stated that he did not "have a problem with her stepping out for that testimony." *Id.* Accordingly, the trial court granted the motion. (*Emphasis added.*)

App. 32-33.

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[4] While the State referenced the existence of the anti-harassment order, none of its terms were actually stated or considered on the record, including whether it actually prohibited contact.

The jury returned guilty findings on March 27, 2003; Petitioner then hired new counsel. App. 13. The new attorney filed a motion for a new trial based upon trial counsel's ineffectiveness in assisting Mr. Freeman's defense. App. 13. The Motion for a New Trial was denied. App. 13.

On September 13, 2003, Petitioner was sentenced to 280 months in prison. App. 13.

Petitioner then filed an appeal in State court. His counsel fulfilled the briefing requirements, and later filed a supplemental memorandum along with a motion asking the court to consider the supplemental briefing as a then-freshly published case had made an otherwise unaddressed issue ripe for consideration by the court. App. 14. The issue was that of the Sixth and Fourteenth Amendment right to a public trial, as well as the same right under the Washington Constitution, art. 1, § 22. The briefing pointed to the fact that Petitioner's fiancée, Aria Rozotti (her name at the time of trial) had been excluded from a part of Petitioner's trial – during Virginia Freeman's testimony (the instance cited above). App. 32-33, 43-44. Appellate counsel's supplemental briefing cited the then-recently published case, *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004), for the court's authority to reverse and remand. (*Orange* reconciled the public trial right under the Washington Constitution, art. 1, § 22, with the Sixth Amendment to the Constitution of the United States. *Id.* at 804. The opinion also established that analysis under the State constitution extended to jury selection and recited that the elements required in the analysis must comply with *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984). *Id.* at 806.)

The Court of Appeals denied Petitioner's appellate claims, affirmed his convictions, and denied his motion to supplement his briefing. App. 14.

The public trial issue became relevant in a different context when Petitioner filed his Personal Restraint Petition in the Washington Court of Appeals. When Petitioner filed his Personal Restraint Petition with the Washington Court of Appeals, the public trial issue became relevant in a different context. Specifically, Petitioner's Reply brief alleged that appellate counsel was ineffective for failing to follow the court rules and request an extension of time so as to allow the State sufficient time to respond. Petitioner also referenced RP 189 as follows,

> THE COURT: I will just tell everyone here, and I will tell everyone one more time, I don't care who you are here on behalf of – it doesn't matter to me if you are here on behalf of the State or on behalf of defendant or simply here as a casual observer, any of those, you're welcome, you're welcome to be here, except for the lady right here, who can't be here when Mrs. Freeman testifies – the rest of you are welcome for the whole trial, but you can't talk about the case in front of anyone you don't know, or within earshot of

> anyone you don't know, because you might be creating a mistrial.

RP 189.

Even though the Court of Appeals summarily denied the supplemental briefing addressing the public trial issue, upon Petitioner's subsequent collateral review, both the Washington Court of Appeals and Washington Supreme Court considered the claim. However, both courts denied the claim after having reviewed its merits. App. 17. As noted by the United States District Court's Report and Recommendation, Petitioner's public trial claim was properly exhausted upon those courts reaching the merits of the claim and it was properly before the court for Habeas review. App. 17.

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REASONS FOR GRANTING PETITION

This case addresses the fundamental right to a public trial. Without the Court's review, the Washington State and United States District Courts' holdings show the public trial issue will be held to something much less than the strict scrutiny demanded by proper analysis and the Constitution. During Habeas Corpus proceedings, the Ninth Circuit rejected the opportunity to review the District Court's decision – a decision reciting a violation of Petitioner's public trial claim under the Sixth Amendment, the Fourteenth Amendment, the First Amendment, and Article 1, § 22 of the Washington State Constitution. In light of *Presley v. Georgia*, 558 U.S. ___, 130 S.Ct. 721, 175

L.Ed.2d 675 (2010) and *State v. Leyerle*, 158 Wn.App. 474, 242 P.3d 921 (2010), the Ninth Circuit's refusal to recognize appealability necessitates this Court's review of an important and recurring constitutional issue that has resurfaced even in the face of the clarity the Court published in *Presley v. Georgia, supra*. Whether full or partial courtroom closure, trial courts must adhere to Constitutional standards requiring examination of possible alternatives to closure, and findings regarding reasonable alternatives to a completely public trial. The instant case lacks such a record. This Court is invited to exercise its power of supervision over the state courts and lower federal courts requiring as much.

I. THE PUBLIC'S AND MR. FREEMAN'S RIGHT TO A PUBLIC TRIAL UNDER THE FIRST, SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES WAS VIOLATED WHEN OBSERVERS WERE REMOVED FROM THE COURTROOM DURING HIS TRIAL.

On January 19, 2010, this Court addressed the efforts trial courts must extend to protect the public's and defendants' rights to public trials. Among its conclusions, the Court stated, "The public has a right to be present whether or not any party has asserted the right." *Presley v. Georgia, supra*, at 724-25. Upon the Court's holding in *Presley*, trial courts absorbed the duty, *sua sponte*, to make a record of the unavailability of alternatives to closing the courtroom. *Id.* at 130 S.Ct. 725 (majority), 727 (dissent). The Court stated,

> . . . even assuming, *arguendo* that the trial court had an overriding interest in closing *voir dire*, it was still incumbent upon it to consider all reasonable alternatives to closure. It did not, and that is all this Court needs to decide.

Id. at 726.

The right to a public trial is rooted in not just the Sixth and Fourteenth Amendments, but the First Amendment as well. *See Press-Enter. Co. v. Superior Court of California*, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984); *Waller v. Georgia*, *supra*; and *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986). These opinions hold public trials a "fundamental right," and that valid closures "will be rare. . . ." *Waller v. Georgia*, *supra*. The *Waller* Court also emphasized that analyzing reasons for closure must be done "with special care." *Id.* And further, the Court held that because an overriding interest overcoming the presumption of openness must be "narrowly tailored to serve that interest . . . ", the interest must be "articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Id.*

The lower courts have labeled Petitioner's situation not as a public trial violation, but as a matter of partial courtroom closure providing less protection than the rights articulated above. However, important to either scenario is the fact that courts are required in either instance to make findings supporting closure, and consider reasonable alternatives to closing the courtroom. App. 35-36, citing *United States v. Sherlock*, 962 F.2d 1349, 1357-59 (9th Cir. 1992). As to the Constitutional requirements, even if this is a case of partial courtroom closure, the *Waller* line of analysis is material to, and absent from, Petitioner's case.

A. The Public's Interest In Preserving Public Trials

While the right to a public trial explicitly protects the accused, it also secures the right of the public to examine the trial process. (Examples include the press, victims, family, and countless other categories of observers.) As such, this Court has previously subjected review of such matters to strict scrutiny analysis. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-07, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982) (holding the State must show a significant justification for denying the public trial right and that denial is "necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.").

Additionally, this Court has long recognized the importance of family and supporters having access to trials. Openness in court proceedings improves the quality of testimony, induces unknown witnesses to come forward with relevant testimony, causes all trial participants to perform their duties more conscientiously and generally gives the public an opportunity to observe the judicial system. *Gannett Co. v. DePasquale*, 443 U.S. 368, 383, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979). Indeed, in the words of Justice Harlan:

> Essentially, the public-trial guarantee embodies a view of human nature, true as a general rule, that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings. A fair trial is the objective, and "public trial" is an institutional safeguard for attaining it.

Estes v. Texas, 381 U.S. 532, 588, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965) (Harlan, J., concurring) (citing *In re Oliver*, 333 U.S. 257, 266-73, 68 S.Ct. 499, 92 L.Ed. 682 (1948)).

Moreover, today, as society becomes increasingly (perhaps exponentially so) connected through technology, micro-publishers, such as independent reporters, bloggers, "tweeters," and Facebook, must be factored into the landscape of "the public." Expeditiously updating the new brand of audiences and observers is as important to those consumers of public information as the policy considerations the

Court has considered for decades concerning traditional mainstream reporters/media. However, the mainstream media has traditionally enjoyed corporate resources, including finances and attorneys to assist in overcoming unconstitutional roadblocks to free court access. Those resources are unrealistic for the new brand of publisher.

This Court has an admirable history of preserving the right to a public trial in ways to serve the public's interest in information and openness. This Court should accept review in the instant case to preserve this historically protected public and individual right.

B. The Need To Supervise The State Court

When the Washington Court of Appeals and the Washington Supreme Court reviewed Petitioner's case on collateral review, their findings were clearly contrary to *Presley* – as well as to the long established body of law requiring trials to be public, and grounds for limited closure to be addressed on the record. *See Press-Enterprise Co. v. Superior Court of California*, *supra*, at 510) (holding that, before ordering a closure, a trial court must render "findings specific enough that a reviewing court can determine whether the closure order was properly entered.").

The District Court, upon review of Petitioner's Habeas Petition, followed the State courts' lead and ruled contrary to the same body of law. In addition to the adoption of the Report and Recommendation, the District Court subsequently denied appealability – stating that the "state court's ruling that the temporary exclusion of Mr. Freeman's fiancée from the trial did not violate his right to a public trial" and was not "contrary to, or [did not involve] an unreasonable application of clearly established Federal Law, as determined by the Supreme Court of the United States." App. 4-5.

Before *Presley* was published in January 2010, Petitioner had filed his objections to the Report and Recommendation. App. 88. Prior to the Ninth Circuit taking action on Petitioner's case, he timely submitted *Presley v. Georgia, supra*, at 724-25, as supplemental authority to the Ninth Circuit. App. 55. Despite petitioning for appeal with complete materials – factual and authoritative – the Ninth Circuit rejected the appealability of this issue, as well as Petitioner's Motion to Reconsider. App. 1-2.

The analysis and results reached by the lower courts directly contradict the well-developed and long-established body of law regarding public trials. Accordingly, the judicial perspective in Washington State, from the state and federal benches alike, needs supervision on this issue. Because the Ninth Circuit refused to provide the necessary oversight, this Court should now act to ensure the Sixth Amendment, and the First Amendment, provide the same individual rights to trial participants and observers in Washington courts as it has in other courts.

Respectfully, this Court must hold the lower courts to the strict analysis required by *Waller, et al.* This court has recently affirmed the continuing requirements to "consider reasonable alternatives to closing the proceeding, and . . . make findings adequate to support the closure." *Waller v. Georgia, supra.* In the absence of one of the parties showing the unavailability of reasonable alternatives to closure, the court must do so. *See Presley v. Georgia, supra.* And the court must record its findings on the issue as well. *Id.* In the event the parties fail in recognizing this fundamental right, under *Presley* the trial court must now, *sua sponte* protect the right by strictly adhering to the long held process involved when the courtroom is closed. *Id.*

This Court should accept review of Petitioner's fiancée's removal because the portion of the District Court's opinion addressing the merits of the claim is rooted in analysis that is explicitly contrary to *Presley* and the extensive body of case law serving as the backbone of constitutional analysis in support of the opinion. Specifically, Petitioner's right to have the trial court consider alternatives to closure.

While addressing the issue of consideration of reasonable alternatives to closing the courtroom, in Petitioner's case the District Court acknowledged that "the trial court did not make express findings regarding reasonable alternatives to temporarily excluding Petitioner's fiancée," and went on to opine, "as a practical matter there were no reasonable alternatives that would have allowed Aria to comply with the anti-harassment order while also being present in the courtroom while Virginia and Amie testified." App. 36. The District Court's analysis engages in assumptions and ignores the rights held by both Petitioner and his removed fiancée under the Sixth, First, and Fourteenth Amendments to the Constitution of the United States. Furthermore, it is contrary to this Court's position in *Presley*. Finally, as to this issue, the District Court stated, "in any case, a trial court has some latitude in meeting the third procedural requirement . . . " App. 36. The District Court may have found a sense of practicality to the trial court's handling of this matter. Nonetheless, *Presley* commands the trial court to ensure defendants are afforded an actual record of all reasonable alternatives to closure. A review of Petitioner's record shows that did not occur. A review of the authority on this body of law also shows the District Court is wrong in asserting the trial court was allowed some "latitude" in its approach to what is really a matter of strict scrutiny.

To assist its exploration into this matter, the District Court was willing to expand the record only enough to take a peek at the transcript of the trial court's handling of this issue. App. 32. The defense attorney supported the State's motion to remove the observer simply to keep things moving along, and the trial court cast an assumption that the existence of an anti-harassment order between a witness and an observer was sufficient to remove the observer. App. 43-44. The court's order to exclude Petitioner's fiancée is void of any finding specific enough that "a reviewing court can determine whether the closure order was properly entered." *Waller, supra*, at 45.

The District Court erroneously declared it undisputed that the anti-harassment order "prohibited Petitioner's fiancée from having contact with Virginia and Amie." App. 35. That is the whole point of the requested review. There was absolutely no discussion or findings related to the terms of the anti-harassment order. *See* App. 43-44, RP 189.

The court made no inquiry as to whether the protection order was still valid, what terms were included, whether actual harassment was the only matter prohibited under the order, or whether Ms. Rozotti was actually prohibited from coming within certain distances of Ms. Freeman. Because the public trial protections were ignored, there is no record to scrutinize, and the only possible conclusion is that the public trial right was not closely guarded in the manner required of even partial courtroom closure. Conversely, the court simply granted the motion for partial courtroom closure without exploring anything factually that could have led the court to consider reasonable alternatives to closure.

The District Court's analysis of this as partial courtroom closure ignores the reality of the daily practice of divorce courts and criminal courts routinely dealing with litigants and witnesses who have orders prohibiting contact.

The Supreme Court filed *Presley* on January 19, 2010, after the District Court's Report and Recommendation was filed in Petitioner's case (July 10, 2009). Before the Ninth Circuit ruled against the appealability of Petitioner's case (January 28, 2011), Petitioner filed additional authority, referencing the *Presley* decision. App. 1, 55. Therefore, the Ninth Circuit erred when it denied the appealability of Petitioner's claim – as the recently published Supreme Court authority was clearly ignored. As to the issues in Petitioner's case, the protections provided by *Presley* govern, whether the instant issue is one of partial closure versus full closure. This Court should now accept review to remedy this error on what was a ripe case under the law at the time the requested relief was denied.

II. THE DISTRICT COURT'S FAILURE TO REVIEW MORE OF THE PROPOSED SUPPLEMENTAL MATERIALS DENIED MR. FREEMAN JUSTICE UNDER *PRESLEY*.

The trial court compounded the public's fundamental right to observe public trials – as well as Petitioner's right to a public trial – when it excluded observers during voir dire. Subsequently, the Ninth Circuit failed to review the District Court's refusal to examine materials exposing the violation of this fundamental right during the voir dire portion of Mr. Freeman's trial. Had the District Court allowed the materials, and subsequently followed this Court's holding in *Presley v. Georgia, supra*, Mr. Freeman's case would have been remanded for a new trial.

Had the District Court allowed the record to be expanded, it would have confronted the identical elements and strict standard of review between both public trial violations. Presumably, addressing the reckless management of multiple public trial violations would have resulted in closer scrutiny than labeling it a dismissive "temporary exclusion." App. 5, 35-36.

Because the record is incomplete, public justice is incomplete.

The District Court's Report and Recommendation acknowledged expanding the record to include consideration of the transcript when Petitioner's fiancée was excluded during Ms. Freeman's testimony. It was apparently essential and helpful to that court to allow the expansion to meaningfully address the public trial issue. Yet, it refused to expand the record as to voir dire, leaving that public trial issue untouched by the courts. App. 10.

The proffered materials showed an additional episode when the trial court failed to create a record or engage in even a hint of the inquiry required by the Constitution and this Court's holding in *Waller v. Georgia*, *supra*. *See* App. 38-48, 94-108.

The matter was managed both on and off the official court record. Because of that difficulty, Petitioner submitted declarations in his proffered materials aimed at supplementing the record. *See*

App. 38-48, 94-116. After the court's off-the-record partial closing of the courtroom, the court referenced its actions on the record during a discussion about voir dire logistics.

> MR. COLASURDO: Okay. Because we both are working off charts, and if you start moving people around –
>
> THE COURT: That's why I told him his witnesses[5] probably can't sit in here, because people stay in the same seats.
>
> MR. COLASURDO: Great.
>
> THE COURT: It's a lot easier for everybody to pick their people that way.
>
> Okay. Any questions?

* * *

App. 47.

Petitioner's case presents this Court with the very harm *Presley v. Georgia* was published to prevent. The factual similarities between Petitioner's case and the *Presley* case are obvious. However, Presley was afforded counsel who ensured a well-preserved record. Petitioner has painstakingly assembled a record to make up for trial counsel's apparent unfamiliarity with the public trial right; neither party nor the judge in Petitioner's case caused a record to be created addressing closure. Apparently, all the trial court did was direct the partial closure while off the record, and then later referenced that the purpose of the directive was one of logistics.

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[5] The court misspoke when referencing "witnesses." There is no question the court meant Petitioner's family and supporters.

The court's actions and errors were a violation of the public's and Petitioner's public trial right. For the legal and policy reasons discussed herein, this Court should review this issue, allowing expansion of the record as proffered to the District Court.

◆

CONCLUSION

Petitioner's case provides this Court the opportunity to ensure the public's interest in public trials is protected. It is perhaps the model case for accepting review. The official record has an individual excluded during the testimony of particular witnesses. The proffered expanded record has a handful of family and friend supporters removed from jury voir dire for logistical reasons. Petitioner is not a public figure and the case is not one receiving media attention. This case therefore is about preserving the right to a public trial for the very type of case that is tempting and easy to overlook.

The trial court ignored a fundamental right. Reviewing courts have refused to honor this Court's directive to review the interests with care, and merely assumed closure was essential. The record, and the *available* record is clear. The opinion published in

Presley v. Georgia, *supra*, provides the proper guidance.

This court should grant the writ of certiorari to enforce the public trial right. Doing so is essential toward addressing an important and recurring Constitutional issue, as seen through decades of analysis of the public trial issue, including the recent *Presley* opinion.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT LEE FREEMAN, Petitioner-Appellant, v. MAGGIE MILLER-STOUT, Respondent-Appellee.	No. 09-35929 D.C. No. 2:07-cv-01805-RAJ Western District of Washington, Seattle ORDER (Filed Jan. 28, 2011)

Before: O'SCANNLAIN and BYBEE, Circuit Judges.

The request for a certificate of appealability is denied. *See* 28 U.S.C. § 2253(c)(2). All pending motions are denied.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT LEE FREEMAN,
Petitioner-Appellant,
v.
MAGGIE MILLER-STOUT,
Superintendent,
Respondent-Appellee.

No. 09-35929

D.C. No. 2:07-cv-01805-RAJ
Western District of
Washington, Seattle

ORDER

(Filed Feb. 28, 2011)

Before: RYMER and CLIFTON, Circuit Judges.

The motion for reconsideration is denied. *See* 9th Cir. R. 27-10.

No further filings shall be accepted in this closed case.

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ROBERT LEE FREEMAN,	
Petitioner,	CASE NO. C07-1805RAJ
v.	ORDER
MAGGIE MILLER-STOUT,	(Filed Oct. 16, 2009)
Respondent.	

This matter comes before the court on the motion (Dkt. # 48) of Petitioner Robert Lee Freeman for a certificate of appealability of this court's August 12, 2009 order and judgment dismissing his habeas petition (Dkt. ## 46-47). That order adopted the Report and Recommendation ("R&R") of the Honorable James P. Donohue.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") requires a habeas petitioner appealing the denial of a 28 U.S.C. § 2254 to obtain a certificate of appealability. 28 U.S.C. § 2253(c). Although the statute is largely silent as to procedures for obtaining a certificate of appealability, both the Federal Rules of Appellate Procedure and the Ninth Circuit's rules dictate that a district court should initially decide whether a certificate should issue. *See* Fed. R. App. P. 22(b)(1) ("If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue."); 9th Cir. Rule 22-1(a). A court may issue a certificate of appealability only if the "applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The Supreme Court has elaborated that a petitioner must show that "reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel,* 529 U.S. 473, 484 (2000) (internal quotations omitted). The decision to issue a certificate of appealability turns not on the court's assessment of the applicant's chances for success on appeal, but whether the appeal would raise material and debatable questions. *Miller-El v. Cockrell,* 537 U.S. 322, 342 (2003) (courts must focus on "the debatability of the underlying constitutional claim, not the resolution of that debate.").

Mr. Freeman raises four issues in his motion, just as he did in his habeas petition. Although he asserts that each of them raises debatable questions, he largely fails to acknowledge the extraordinary deference that AEDPA mandates for the state court determinations being challenged here. Thus, the question before the court is whether reasonable jurists could debate whether the state court judgment under attack was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

For three of the four issues Mr. Freeman raises, the court finds the answer to be no. For the reasons stated in the R&R, the court finds that reasonable jurists would not debate that there was neither an unreasonable application of federal law nor any judgment contrary to law in the state court's determination that Mr. Freeman did not receive ineffective assistance of counsel. The same is true of the state court's ruling that the temporary exclusion of Mr. Freeman's fiancée from the trial did not violate his right to a public trial. Finally, reasonable jurists would not debate whether the state court's determination that prosecutorial misconduct did not deprive Mr. Freeman of a fair trial was contrary to or involved an unreasonable application of federal law.

Mr. Freeman's fourth argument is that the trial court erred in admitting his victim's diary into evidence. Mr. Freeman correctly notes that the R&R does not address this claim separately, but rather focuses on the contention that Mr. Freeman's counsel's failure to have the diary excluded was ineffective assistance. Nonetheless, light of the ample evidence of Mr. Freeman's guilt, the court does not find that reasonable jurists would debate whether the state court made a decision contrary to law or involving an unreasonable application of law.

For the reasons stated above, the court DENIES Mr. Freeman's motion for a certificate of appealability (Dkt. # 48).

DATED this 16th day of October, 2009.

/s/ Richard A. Jones
The Honorable
Richard A. Jones
United States
District Judge

United States District Court
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ROBERT LEE FREEMAN,

Petitioner,

v.

MAGGIE MILLER-STOUT,

Respondent.

JUDGMENT IN A CIVIL CASE

(Filed Aug. 12, 2009)

Case No. 07-cv-01805-RAJ

__ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

The Report and Recommendation (Dkt. # 44) is adopted and approved. The habeas petition is DENIED and this case is DISMISSED with prejudice.

Dated this 12th day of August, 2009.

BRUCE RIFKIN
Clerk

/s/ Consuelo Ledesma
Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ROBERT LEE FREEMAN,	
Petitioner,	Case No. 07-cv-1805-RAJ
v.	ORDER OF DISMISSAL
MAGGIE MILLER-STOUT,	(Filed Aug. 12, 2009)
Respondent.	

The Court, after careful consideration of Petitioner's 28 U.S.C. § 2254 petition for writ of habeas corpus, the Report and Recommendation (Dkt. # 44) of the Honorable James P. Donohue, the governing authorities, and the balance of the record, hereby finds and ORDERS:

(1) The Court adopts the Report and Recommendation.

(2) The habeas petition is DENIED and this case is DISMISSED with prejudice.

(3) Petitioner's motion for an evidentiary hearing, Dkt. No. 23, is DENIED as moot.

(4) The Clerk is directed to send copies of this Order to all counsel of record and to Judge Donohue.

DATED this 12th day of August, 2009.

/s/ Richard A. Jones
The Honorable
Richard A. Jones
United States
District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ROBERT LEE FREEMAN, Petitioner, v. MAGGIE MILLER-STOUT, Respondent.	Case No. 07-cv-1805-RAJ-JPD REPORT AND RECOMMENDATION (Filed Jul. 10, 2009)

I. INTRODUCTION AND SUMMARY CONCLUSION

Petitioner Robert Lee Freeman, a state inmate, has filed a 28 U.S.C. § 2254 petition for writ of habeas corpus, Dkt. No. 3, which challenges his convictions for three counts of rape of a child and three counts of child molestation in King County Superior Court. Respondent has filed an answer opposing the petition, Dkt. No. 26, to which Petitioner has replied, Dkt. No. 32. After careful consideration of the petition, all briefs in support and opposition thereto, all governing authorities, and the balance of the record, the Court recommends that the petition be DENIED and this case DISMISSED with prejudice.

II. FACTS AND PROCEDURAL HISTORY

A. Factual Background

Petitioner was charged with four counts of rape of a child in the first degree on March 14, 2002. Dkt.

No. 29, Exh. 1. The information alleged that Petitioner repeatedly had sexual contact with his underage stepdaughter, Amie Freeman, over the course of several years. *Id.* Petitioner pleaded not guilty and the matter proceeded to trial. Shortly before trial, the information was amended to charge Petitioner with rape of a child in the first, second, and third degrees, and child molestation in the first, second, and third degrees.

The trial began on March 18, 2003. Dkt. No. 29, Exh. 24. Amie Freeman testified during the trial at length and in often difficult detail about the sexual abuse she was subjected to by Petitioner, her stepfather at the time, from the time she was in the fourth grade until she was in the ninth grade. *See* Dkt. No. 29, Exh. 24 at 451-660. At the time of the abuse, Amie lived with Petitioner, her younger half-brother Tony, and her mother, Virginia.[1]

Amie's testimony at trial revealed that Petitioner would frequently enter Amie's bedroom late at night, sit on her bed, and would rub Amie's upper legs, buttocks, and vaginal area under her clothing, including digitally penetrating her vagina. Petitioner did this between one and four times per week. Amie did not see what else Petitioner was doing when he was rubbing her with his hand because she turned away on her bed from him. On one occasion Petitioner lifted

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[1] As all the members of the family have the same surname, the Court will refer to them by their first names.

Amie on top of him and rubbed her vaginal area against his penis while he was laying down on her bed with his underwear on. After Petitioner finished, Amie testified that he would leave her room and wash his hands.

Amie testified that she eventually noticed wet spots on the carpet around her bed near where Petitioner had been. As she was young, she did not initially know what the spots were, but in time she began to assume that the spots were Petitioner's semen. Virginia also noticed stains on the carpet in Amie's bedroom. In addition, Amie noticed similar stains on a teddy bear that she kept on and around her bed.

Amie told some friends about the molestation, but did not tell Virginia until she was in the ninth grade. Virginia then confronted Petitioner, but he denied sexually abusing Amie. The sexual abuse ended at this time.

Amie personally confronted Petitioner about the abuse when she was 17 years old. She slapped him, and Virginia told Petitioner to leave the house. He would not leave, so Virginia called the police, who came to the home. Amie testified that she did not tell the police about the sexual abuse at that time because she believed she would be placed in foster care. In August 2001, when Amie was 18 years old, she testified that Petitioner admitted the sexual abuse to her and Virginia during a long conversation and he apologized.

Virginia reported the molestation to the police on September 17, 2001, after reporting a domestic violence assault by Petitioner. An investigation by the authorities ensued, and Virginia provided the stained teddy bear to Detective Vivian Dahlin. Detective Dahlin also took three carpet samples from Amie's bedroom; two of the carpet samples were stained and the third carpet sample was a control sample. A forensic scientist from the Washington State Patrol Crime Lab testified at trial that she tested the teddy bear and the two stained carpet samples, and found that the stains were Petitioner's pure semen; in other words, there was no DNA from Petitioner's wife (and Amie's mother) Virginia on any of the samples.

On March 27, 2003, the jury found Petitioner guilty of three counts of rape of a child and three counts of child molestation, as he was charged. Dkt. No. 29, Exh. 2. Petitioner fired his trial counsel and hired new counsel, who filed a motion for new trial based upon ineffective assistance of counsel. The trial court held a hearing on Petitioner's motion for new trial on September 11, 2003, during which the trial court heard testimony from Petitioner, Petitioner's trial counsel, and Detective Dahlin. Dkt. No. 29, Exh. 25. After the hearing, the trial court denied Petitioner's motion for a new trial. *Id.* On September 13, 2003, Petitioner was sentenced to 280 months in prison. Dkt. No. 29, Exh. 2.

B. Direct Review

Petitioner filed a notice of appeal on October 9, 2003. Dkt. No. 29, Exh. 3. Petitioner's appellate counsel alleged ineffective assistance of trial counsel in his brief, Dkt. No. 29, Exh. 4, and Petitioner also raised additional claims in his *pro se* appellate brief, including prosecutorial misconduct, Dkt. No. 29, Exh. 5. Before a decision was issued by the Washington Court of Appeals, Petitioner's counsel moved to file a supplemental brief and to supplement the record regarding a claim that Petitioner's right to a public trial had been violated by his fiancé's temporary exclusion during the trial. Dkt. No. 29, Exhs. 6, 7. The Court of Appeals denied Petitioner's claims and affirmed his convictions, and also summarily denied in a footnote Petitioner's motion to supplement his briefing and the record regarding the public trial claim. Dkt. No. 29, Exh. 9.

Petitioner filed a *pro se* petition for discretionary review with the Washington Supreme Court on March 23, 2005. Dkt. No. 29, Exh. 12. Petitioner raised the same claims that were raised before the Court of Appeals, and also challenged the Court of Appeals' denial of his motion to supplement his briefing and the record. *Id.* His petition for discretionary review was summarily denied by the Supreme Court on November 2, 2005. Dkt. No. 29, Exh. 13.

C. Personal Restraint Petition

Petitioner filed a personal restraint petition with the Washington Court of Appeals on June 26, 2006. Dkt. No. 29, Exh. 16. Petitioner raised, among other claims, his public trial, prosecutorial misconduct, and ineffective assistance of counsel claims. *Id.* The Court of Appeals dismissed the personal restraint petition in a written opinion on March 26, 2007. Dkt. No. 29, Exh. 18. Petitioner then petitioned the Washington Supreme Court for discretionary review, which denied the petition in a written ruling on June 26, 2007. Dkt. No. 29, Exh. 20. Petitioner moved to modify the Commissioner's ruling, which was denied on September 5, 2007. Dkt. No. 29, Exh. 21.

D. Federal Collateral Review

The instant § 2254 petition was timely filed by Petitioner with the district court on November 6, 2007. Dkt. No. 1. Petitioner is currently incarcerated at the Airway Heights Corrections Center in Airway Heights, Washington.

III. ISSUES PRESENTED

Petitioner's § 2254 habeas petition raises three primary grounds for relief: ineffective assistance of counsel, prosecutorial misconduct, and denial of a public trial due to his fiancé's temporary exclusion. Dkt. No. 3.

IV. DISCUSSION

A. Petitioner Has Exhausted His Claims.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996), governs petitions for habeas corpus filed by prisoners who were convicted in state courts. *See* 28 U.S.C. § 2254. In order for a federal district court to review the merits of a § 2254 petition, the petitioner must first exhaust his state court remedies. 28 U.S.C. § 2254(b)(1)(A); *Fields v. Waddington,* 401 F.3d 1018, 1020 (9th Cir. 2005). The purpose of the exhaustion doctrine is to preserve federal-state comity which, in this setting, provides state courts an initial opportunity to correct violations of its prisoners' federal rights. *Picard v. Connor,* 404 U.S. 270, 275 (1971); *Ex parte Royall,* 117 U.S. 241, 251-52 (1886). A petitioner can satisfy the exhaustion requirement by either (1) fairly and fully presenting each of his federal claims to the highest state court from which a decision can be rendered, or (2) demonstrating that no state remedies are available to him. *Johnson v. Zenon,* 88 F.3d 828, 829 (9th Cir. 1996). A petitioner fairly and fully presents a claim if he submits it "(1) to the proper forum, (2) through the proper vehicle, and (3) by providing the proper factual and legal basis for the claim." *Insyxiengmay v. Morgan,* 403 F.3d 657, 668 (9th Cir. 2005).

Here, the Court finds that Petitioner has exhausted his claims in his habeas petition.[2] His ineffective assistance of counsel and prosecutorial misconduct claims were properly raised on both direct and/or collateral review in state court. Regarding his public trial claim concerning his fiancé's temporary exclusion, he attempted to raise it on direct review, but was denied the opportunity to supplement his briefing and the record to support the claim by the Washington Court of Appeals, presumably because his appellate counsel was late in seeking to do so. Petitioner challenged the Court of Appeals' summary denial of his motion to supplement, but was summarily denied by the Washington Supreme Court. However, while Petitioner was unsuccessful in presenting his public trial claim on direct review, on collateral review he presented the claim to both the Washington Court of Appeals and Supreme Court and the claim was considered and denied on the merits by each court. Accordingly, although Petitioner arguably did not provide a sufficient factual basis for his public trial claim in state court, the Court deems Petitioner's public trial claim to be properly exhausted.

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[2] For the sake of clarity, the Court notes that it did not consider Petitioner's claim regarding the voir dire of the jury, which he characterized as both an ineffective assistance of counsel claim and a denial of public trial claim. *See* Dkt. No. 17. Petitioner did not raise this claim in his state court proceedings and it was raised for the first time in federal court nearly a year after he filed his habeas petition, and the Court denied Petitioner's motion to expand the record in support of this claim. *See* Dkt. No. 22.

See Wood v. Alaska, 957 F.2d 1544, 1549 (9th Cir. 1992) (holding that federal courts may consider an otherwise barred claim on habeas review if state courts reached merits of claim).

B. Standard Of Review For Exhausted Claims

AEDPA "demands that state-court decisions be given the benefit of the doubt." *Woodford v. Visciotti,* 537 U.S. 19, 24 (2002). A habeas petition may be granted with respect to any claim adjudicated on the merits in state court only if the state court's adjudication is "*contrary to,* or involved an *unreasonable application of* clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1) (emphasis added).

Under the "contrary to" clause of AEDPA, a federal habeas court may grant the writ only if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *See Bell v. Cone,* 543 U.S. 447, 452-53 (2005) (citing *Williams v. Taylor,* 529 U.S. 362, 405 (2000)). Under the "unreasonable application" clause, a federal habeas court may grant the writ only if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the petitioner's case, or if the state court either unreasonably extends a legal principle from Supreme Court precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply. *Williams v. Taylor,* 529 U.S. 362, 407 (2000). In addition, a habeas corpus petition may be granted if the state court decision was based on an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d)(2).

In *Lockyer v. Andrade,* 538 U.S. 63 (2003), the Supreme Court examined the meaning of the phrase "unreasonable application of law," ultimately correcting an earlier interpretation by the Ninth Circuit Court of Appeals which had equated the term with the phrase "clear error." The Court explained:

> These two standards . . . are not the same. *The gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness. It is not enough that a federal habeas court, in its "independent review of the legal question" is left with a "firm conviction" that the state court was "erroneous."* . . . [A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must be objectively unreasonable.

Lockyer, 538 U.S. at 75-76 (citations omitted, emphasis added).

In sum, the Supreme Court has directed lower federal courts reviewing habeas petitions to be extremely deferential to state court decisions. A state court's decision may be overturned only if the application is "objectively unreasonable." *Id.* Whether a state court adjudication was reasonable depends upon the specificity of the rule: "the more general the rule, the more leeway courts have[.]" *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004).

C. Ineffective Assistance of Counsel Claims

Claims of ineffectiveness of counsel are reviewed according to the standard announced in *Strickland v. Washington*, 466 U.S. 668, 687-90 (1984). In order to prevail on such a claim, the petitioner must establish two elements. First, he must establish that counsel's performance was deficient, *i.e.*, that it fell below an "objective standard of reasonableness" under "prevailing professional norms." *Strickland*, 466 U.S. at 687-88. Second, the petitioner must establish that he was prejudiced by counsel's deficient performance, *i.e.*, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Considering the first prong of the *Strickland* test, the petitioner must rebut the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. The test is not whether another lawyer, with the benefit of hindsight, would have acted differently, but rather, whether "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687, 689; *see also Dows v. Wood*, 211 F.3d 480, 487 (9th Cir. 2000) ("Under *Strickland*, counsel's representation must be only objectively reasonable, not flawless or to the highest degree of skill.").

To meet the second *Strickland* requirement of prejudice, the petitioner must show that counsel's deficient performance prejudiced the defense. *Id.* at 687. It is not enough that counsel's errors had "some conceivable effect on the outcome." *Id.* at 693. Rather, the petitioner must establish a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 691. "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the case. *Id.* at 694. Failure to satisfy either prong of the *Strickland* test obviates the need to consider the other. *Rios v. Rocha*, 299 F.3d 796, 805 (9th Cir. 2002).

Here, Petitioner claims that his trial counsel rendered ineffective assistance by (1) failing to object to or limit the use of Amie's diary; (2) failing to object to Virginia's testimony about her fear of Petitioner and that she removed him from the home; and (3) failing to interview Amie and Virginia before trial. Dkt. No. 3.

The Washington Court of Appeals rejected these claims, concluding that Petitioner was not prejudiced by trial counsel's decisions since there was "overwhelming evidence supporting the jury's guilty verdict." Dkt. No. 29, Exh. 9. Petitioner's motion for discretionary review was denied by the Washington Supreme Court.

The Court has reviewed the record and finds that the state courts' adjudication of his ineffective assistance of counsel claims were neither contrary to, nor involved an unreasonable application of, clearly established federal law. Petitioner's first claim of ineffective assistance, that his trial counsel failed to object to or limit the use of Amie's diary, does not meet either prong of the *Strickland* test. As an initial matter, Petitioner acknowledges that defense counsel objected to the diary's admission during pretrial motions, to no avail. Dkt. No. 32 at 19. In any case, once admitted, the diary was integral to the defense, which used the diary to attempt to impeach Amie's testimony and to support the defense theory that Amie and Virginia made up the sexual abuse allegations and were, in effect, "out to get" Petitioner. *See* Dkt. No. 29, Exh. 24 at 628-639. Tactical decisions by counsel during trial need only meet an objectively reasonable standard. *Dows v. Wood*, 211 F.3d 480, 487 (9th Cir. 2000).

Even if allowing the diary's admission or failing to limit its use constituted deficient performance, Petitioner has failed to meet the second *Strickland* requirement; that is, he has failed to demonstrate how the admission of the diary prejudiced the defense. Amie testified to the sexual molestation by Petitioner at length and in detail; therefore, the jury learned of the incidents at issue regardless of whether the diary was admitted or not. The evidence beyond Amie's testimony was also substantial: the DNA evidence from the carpet samples and teddy bear supported Amie's and Virginia's testimony, and refuted Petitioner's explanations for the stains of his ejaculate being on Amie's bedroom's carpet. Accordingly, Petitioner has failed to establish a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 691.

Petitioner's second claim of ineffective assistance, that his trial counsel failed to object to Virginia's testimony about her fear of Petitioner and her removal of him from the home, also fails to satisfy either prong of *Strickland*. This testimony was relevant and not unfairly prejudicial because it was used by the prosecution to help explain the delay in reporting the sexual abuse. Therefore, the Court cannot conclude that a failure to object to this testimony was objectively unreasonable. In any event, even assuming that trial counsel's failure to object was deficient, Petitioner has failed to show prejudice. Amie also testified to her fear of Petitioner, Dkt. No. 29, Exh. 24 at 620-21, making it unlikely that counsel's failure to object to Virginia's testimony on the matter would have had any effect on the result of the trial.

Petitioner's third claim of ineffective assistance, that his trial counsel failed to interview Amie and Virginia prior to trial, also fails the *Strickland* test. During the hearing on Petitioner's motion for a new trial based on his claim of ineffective assistance of trial counsel, Petitioner's trial counsel testified that he chose not to interview Amie and Virginia before trial because he had significant familiarity with them after representing Petitioner in prior domestic matters. Dkt. No. 29, Exh. 25 at 20. In addition, trial counsel testified that since part of the defense theory was that the semen in Amie's bedroom was planted, trial counsel did not want to reveal this approach to Amie, Virginia, and the prosecutor by interviewing Amie and Virginia prior to trial. *Id.* at 21-22, 25. Further, trial counsel testified that Petitioner did not want him to interview Amie prior to trial because Petitioner believed that Amie was being put up to "this whole scheme" that was orchestrated by Virginia, and Petitioner believed that Amie would reveal the truth that Petitioner did not sexually molest her when she took the stand. *Id.* at 24. Lastly, trial counsel testified that he prepared for trial with the state's discovery materials, information from his private investigator, interviews with other witnesses, Amie's diary, testimony from Petitioner's domestic violence case, and affidavits from Petitioner's divorce proceedings. *Id.* at 22-23, 25. At the hearing on the motion for new trial, the trial court found that trial counsel "knew exactly what" Amie and Virginia were going to say and was adequately prepared for both their cross-examinations. *Id.* at 58. Based on all of the foregoing, the Court finds that trial counsel's decision not to interview Amie and Virginia prior to trial was reasonable and falls within "the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

Nevertheless, even assuming that trial counsel's decision not to interview Amie and Virginia prior to trial was objectively unreasonable, Petitioner has failed to show prejudice. The evidence against Petitioner at trial was considerable, and his explanations for his semen being in Amie's bedroom were contradicted by the DNA evidence. In view of this, Petitioner has failed to demonstrate how interviewing Amie and Virginia prior to trial would have revealed anything that would have led to a different outcome at trial.

D. Prosecutorial Misconduct Claims

As his second ground for relief, Petitioner raises four claims that he characterizes as prosecutorial misconduct: (1) that the prosecutor withheld DNA evidence and presented false DNA evidence; (2) that the prosecutor "vouched" for the credibility of a witness during his closing; (3) that the prosecutor introduced false testimony; and (4) that the prosecutor became an unsworn witness.

The Washington State Court of Appeals and Supreme Court each reviewed many of these claims on direct and collateral review, and they found that the record did not establish prosecutorial misconduct, and, even if there was misconduct, it could have been cured by limiting instructions. Dkt. No. 29, Exhs. 9, 18, 20.

Federal habeas review of prosecutorial misconduct claims is limited to the narrow issue of whether the alleged misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Thompson v. Borg,* 74 F.3d 1571, 1576 (9th Cir. 1996) (internal quotations omitted). Prosecutorial misconduct violates due process when it has a "substantial and injurious effect or influence in determining the jury's verdict." *Ortiz-Sandoval v. Gomez,* 81 F.3d 891, 899 (9th Cir. 1996) (internal quotations omitted).

After a careful review of the state court record, this Court finds no prosecutorial misconduct of a constitutional dimension sufficient to grant the petition for writ of habeas corpus. Petitioner's allegation that the prosecutor withheld DNA evidence and presented false DNA evidence at trial has no support in the record. The record establishes that there were only three carpet samples taken by Detective Dahlin from the Freeman home that were used for DNA testing, provided to Petitioner, and used at trial: VED 11, VED 12, and VED 13. Moreover, the only reasonable conclusion from the record is that the photograph taken by Detective Dahlin of the carpet near Amie's bed was of the VED 11, VED 12, and VED 13 carpet samples, which, as the record establishes, were the only three carpet samples taken from the Freeman home. Indeed, the forensic scientist from the

Crime Lab testified that she only tested two carpet samples (VED 13 being the control sample). Dkt. No. 29, Exh. 24 at 369-370. Moreover, the trial court's order on Plaintiff's suppression motion makes clear that VED 1, VED 2, and VED 3 are not withheld carpet samples as Petitioner claims, but a blow-up doll and handwritten papers obtained from the Freeman property. Dkt. No. 1-3 at 75. There is simply no support in the record that three additional carpet samples labeled VED 1, VED 2, and VED 3 exist somewhere and were not provided to Petitioner, as he claims.

But even if that was the case, Petitioner has not shown how the existence of three additional carpet samples could have had any effect on the jury's verdict, particularly given that from the time Petitioner was first interviewed by the authorities, he did not challenge that it was his semen that was on the carpet of Amie's room: his explanation during the investigation and at trial was that the stains of his semen on Amie's bedroom's carpet either dripped from Virginia after she had sexual intercourse with Petitioner, was the result of sexual relations between him and Virginia in Amie's room, or was planted there by Virginia. *See, e.g.*, Dkt. No. 29, Exh. 24 at 743; Dkt. No. 29, Exh. 25 at 25; Dkt. No. 29, Exh. 25 at 31; Dkt. No. 29, Exh. 25 at 33-34. Because Petitioner never asserted that the semen in Amie's bedroom was someone else's, the Court cannot conclude that, even if the alleged three additional carpet samples existed, that it would have had any effect on the jury's verdict.

Petitioner's additional allegations that the prosecutor "vouched" for the credibility of a witness in his closing, introduced false testimony, and became an "unsworn witness," also lack merit. Regarding Petitioner's allegation that the prosecutor "vouched" for the credibility of a witness, in fact the prosecutor only asked the jury to think of what Amie and her mother "could have said if they were really out to get the defendant if they were willing to lie to get the defendant, think of what they could have said." Dkt. No. 29, Exh. 24 at 845. In asserting that this statement was inappropriate "vouching," Petitioner relies on the First Circuit's decision in *United States v. Martinez-Medina,* 279 F.3d 105 (1st Cir. 2002), which held that a prosecutor's statement to the jury that four witnesses "would have concocted more damaging stories if they had been lying in order to curry favor with the government" was improper. *Martinez-Medina,* 279 F.3d at 119-120. However, as an initial matter, the language in *Martinez-Medina* disapproving of the prosecutor's statement was expressly disclaimed by the First Circuit less than two years later in *United States v. Perez-Ruiz,* 353 F.3d 1, 10 (1st. Cir. 2003). In *Perez-Ruiz,* the First Circuit held that its language in *Martinez-Medina* regarding the prosecutor's statement was dictum, based on an "understandable misreading" of prior First Circuit case law, and "not good law." *Perez-Ruiz,* 353 F.3d at 10. Second, while it disapproved of the prosecutor's statement, the

Martinez-Medina court nonetheless held that the prosecutor's remarks did not warrant a new trial. *Martinez-Medina,* 279 F.3d at 120. Third, even if this Court were bound by the First Circuit's decision in *Martinez-Medina,* the prosecutor's statement in that case is materially different than the statement challenged by Petitioner: in *Martinez-Medina,* the prosecutor, in effect, stated that the witnesses were truthful because he knew they would have said something different if they were lying – but the prosecutor's knowledge was not evidence before the jury. That is not the case here: the prosecutor merely told the jury to "think" about what Amie and her mother "could have said" if they were "really out to get the defendant." Dkt. No. 29, Exh. 24 at 845. The prosecutor in the instant case did not tell the jury that he knew Amie and her mother "would have" said something different if they were lying, as the prosecutor effectively did in *Martinez-Medina.*

With respect to Petitioner's allegation that the prosecutor introduced false testimony, Petitioner alleges that the prosecutor had Amie testify falsely about statements made to her by a school counselor named Rose Russell. Petitioner alleges that Ms. Russell was never Amie's counselor, and that Ms. Russell never made the statements that Amie testified to. There is no support in the record for Petitioner's allegations. Amie did not testify that Ms. Russell was her counselor; in fact, Amie testified that her entire conversation with Ms. Russell last [sic] only ten minutes. Dkt. No. 29, Exh. 24 at 653-655. Moreover, Amie did not testify to statements made by Ms. Russell; indeed, Petitioner's counsel objected on the basis of hearsay, which was sustained. *Id.* Amie only testified that it was her understanding that Ms. Russell approached her because of rumors of sexual abuse regarding Amie that Ms. Russell had heard around school. *Id.* Moreover, contrary to Petitioner's apparent claim, Ms. Russell did have a recollection of Amie; Petitioner's counsel testified at the hearing on the motion for new trial that Ms. Russell recalled who Amie was, but that she could not independently remember discussions with Amie regarding allegations of sexual abuse one way or the other. Dkt. No. 29, Exh. 25 at 29-31. This is not unexpected, given that the conversation occurred several years prior and, according to Amie, lasted only ten minutes. In any event, Amie's testimony regarding her brief conversation with Ms. Russell was favorable to Petitioner, because Amie testified that she *denied* the sexual abuse to Ms. Russell, although Amie explained that she did so because at the time she was afraid she would be taken away from her mother and younger brother. Dkt. No. 29, Exh. 24 at 653-655.

Lastly, Petitioner's allegation that the prosecutor became an "unsworn witness" during the trial is unavailing. Petitioner alleges that the prosecutor became an unsworn witness when he placed witness Debra McBain, a childhood friend of Amie's, on the stand and asked Ms. McBain about her conversation with Detective Dahlin about the case. Petitioner alleges that it was the prosecutor, not Detective

Dahlin, who contacted Ms. McBain on the telephone and interviewed her about the case. Again, there is no support in the record for Petitioner's allegation. The record reveals that Detective Dahlin was initially unable to locate Ms. McBain to interview her. Thereafter, the prosecutor obtained Ms. McBain's telephone number by using the phonebook and speaking with every McBain listed in the book until he found a relative who could direct him to the correct Ms. McBain. Dkt. No. 29, Exh. 24 at 222. Then, the prosecutor provided the contact information to Detective Dahlin to contact and interview Ms. McBain. *Id.* Because the prosecutor was concerned about Ms. Dahlin specifically testifying that the prosecutor provided the contact information to her, and because the prosecutor did not want to give the jury the incorrect impression that Amie provided the contact information to Detective Dahlin, he raised the issue with the trial court, and all counsel and the trial court agreed that it would be fine if Detective Dahlin testified that "the State" went through the phonebook during the investigation to obtain Ms. McBain's contact information, or words to that effect. Dkt. No. 29, Exh. 24 at 223-225. Indeed, Detective Dahlin so testified, and testified that the contact information was not provided to her by Amie. Dkt. No. 29, Exh. 24 at 340-343. The prosecutor did not become an "unsworn witness."

In any case, the foregoing allegations of prosecutorial misconduct, even if they were error, did not so infect the trial with unfairness as to make

Petitioner's resulting conviction a denial of due process. *See Thompson v. Borg,* 74 F.3d 1571, 1576 (9th Cir. 1996). Indeed, Petitioner has failed to demonstrate how any of his additional alleged improprieties by the prosecutor could have had a "substantial and injurious effect on or influence in determining the jury's verdict," *Ortiz-Sandoval v. Gomez,* 81 F.3d 891, 899 (9th Cir. 1996), in view of the overwhelming evidence against Petitioner at trial. Accordingly, federal habeas relief on the basis of Petitioner's prosecutorial misconduct claims is unwarranted.

E. Public Trial Claim

As his third ground for relief, Petitioner alleges that the trial court violated his right to a public trial under the Sixth and Fourteenth Amendments when his fiancé, Aria Rozotti (now Freeman), was excluded from the courtroom during Virginia's and Amie's testimony. The prosecutor moved to have Aria temporarily excluded because an anti-harassment order was in place prohibiting Aria from having contact with Virginia and Amie. Dkt. No. 17, Exh. D at 12-14.[3] The trial court asked defense counsel if there were any objections, to which defense counsel stated that he did not "have a problem with her stepping out for that testimony." *Id.* Accordingly, the trial court granted the motion. *Id.*

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[3] Although the Court denied Petitioner's motion to expand the state court record in his federal habeas proceeding, Dkt. No. 22, review of this particular exhibit, which is a transcript of a pretrial proceeding, was necessary in order to give full consideration to Petitioner's public trial claim regarding his fiancé's temporary exclusion.

The Washington Court of Appeals and Supreme Court each reviewed Plaintiff's public trial claim regarding his fiancé's temporary exclusion on collateral review. The Court of Appeals found Petitioner's public trial claim to be "frivolous," Dkt. No. 29, Exh. 18, and the Washington Supreme Court found Aria's temporary exclusion to be within the trial court's discretion to regulate the conduct of the trial, Dkt. No. 29, Exh. 20.

Article I, Section 22 of the Washington State Constitution and the Sixth Amendment of the United States Constitution provide criminal defendants the right to a public trial. *State v. Brightman,* 155 Wn.2d 506, 514 (2005). The right to a public trial allows the public to see that the accused is treated fairly, helps ensure that the judge and prosecutor carry out their duties responsibly, encourages witnesses to come forward, and discourages perjury. *See Waller v. Georgia,* 467 U.S. 39, 69 (1984). However, the right to a public trial is not absolute, and a full closure or a partial closure of a trial court proceeding may occur.

In Washington, a defendant's public trial right can give way to the trial judge's "power to control the courtroom consistent with the ends of justice." *State v. Pacheco,* 107 Wn.2d 59, 67 (Wash. 1986); *see also State v. Gregory,* 158 Wn.2d 759, 816 (Wash. 2006). In

Gregory, the defendant's aunt was temporarily excluded from the courtroom when the trial judge observed the aunt shaking her head "no" during defendant's grandmother's testimony; the aunt was ordered to be excluded for the remainder of the grandmother's testimony. In upholding the partial closure, the Washington Supreme Court distinguished full closures from partial closures, and found that the trial court never fully closed the courtroom by excluding one person for a limited period of time. Accordingly, the Supreme Court held that its prior case law regarding full closures did not limit or undermine "the trial court's inherent authority to regulate the conduct of a trial by excluding one person from the courtroom for a limited period of time." *Gregory,* 158 Wn.2d at 816. The Supreme Court noted with approval that the trial judge explained its reason for excluding the aunt, the defense had an opportunity to object, and the trial judge limited the exclusion to the duration of the grandmother's testimony. *Id.* The Supreme Court concluded that the defendant's right to a public trial was not violated. *Id.*

The Court of Appeals for the Ninth Circuit has also drawn a distinction between full closures and partial closures. *See United States v. Sherlock,* 962 F.2d 1349, 1356-57 (9th Cir. 1992). In *Sherlock,* the Ninth Circuit held that the United States Supreme Court's decision in *Waller v. Georgia,* 467 U.S. 39 (1984), addressed total closures of a trial court proceeding, and therefore did not necessarily govern partial closures. *Sherlock,* 962 F.2d at 1356. The

Ninth Circuit held that the more lenient "substantial reason" standard applied to partial closures, rather than the United States Supreme Court's "overriding interest" standard in *Waller*. *Id.* at 1357. In addition to the requirement that there be a "substantial reason" for the partial closure, the Ninth Circuit further held that the closure must be narrowly tailored to the extent necessary to satisfy the purpose for which it was ordered and that three procedural requirements be met: (1) the trial court must hold a hearing on the closure motion; (2) the court must make findings to support the partial closure; and (3) the court must consider reasonable alternatives to closing the courtroom. *Id.* at 1357-59. The first procedural requirement is met when the court gives the defendant the right to be heard. *Id.* at 1358.

Here, the Court finds that the trial court's temporary exclusion of Petitioner's fiancé meets the requirements under *Gregory*, *Sherlock*, and *Waller*. It is undisputed that a valid anti-harassment order prohibited Petitioner's fiancé from having contact with Virginia and Amie. Accordingly, the trial court had no choice but to order Petitioner's fiancé's temporary exclusion from the courtroom during the testimony of Amie and Virginia. The partial closure was narrowly tailored to the extent necessary to satisfy the purpose for which it was ordered: to comply with the valid anti-harassment order and minimize, if not preclude, contact between Petitioner's fiancé and Amie and Virginia. Moreover, the trial court gave defense counsel an opportunity to be heard, and defense counsel stated that he did not object to the partial, temporary exclusion. Dkt. No. 17, Exh. D at 12-14. While the trial court did not make express findings regarding reasonable alternatives to temporarily excluding Petitioner's fiancé, as a practical matter there were no reasonable alternatives that would have allowed Aria to comply with the anti-harassment order while also being present in the courtroom while Virginia and Amie testified. In any case, a trial court has some latitude in meeting the third procedural requirement, as the Ninth Circuit found the requirement to be met in *Sherlock* even though the trial court said very little regarding alternatives to a partial closure. *See Sherlock*, 962 F.2d at 1359. In sum, the temporary exclusion of Petitioner's fiancé from the courtroom for the duration of Virginia's and Amie's testimony due to a valid anti-harassment order did not violate Petitioner's right to a public trial.

V. CONCLUSION

For the foregoing reasons, this Court recommends that the petition be DENIED and this case DISMISSED with prejudice. Petitioner's motion for an evidentiary hearing, Dkt. No. 23, is DENIED as moot. A proposed Order accompanies this Report and Recommendation.

DATED this 10th day of July, 2009.

/s/ James P. Donohue
JAMES P. DONOHUE
United States
Magistrate Judge

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR KING COUNTY

State of Washington,	)	King County cause
Plaintiff,	)	No. 02-1-01727-1 KNT
vs.	)	Kent, WA
Robert Lee Freeman,	)	February 21, 2003
Defendant.	)	1:30 p.m.

VERBATIM REPORT OF PROCEEDINGS BEFORE THE HONORABLE RICHARD F. MCDERMOTT JUDGE OF THE SUPERIOR COURT

APPEARANCES:

Mr. Andy Colasurdo
Deputy Prosecuting Attorney

Mr. Stephen Freeborn
Attorney for Defendant

REPORTED BY: DAVID M. ERWIN, RPR, CSR
OFFICIAL COURT REPORTER
REGIONAL JUSTICE CENTER
401 4TH AVENUE NORTH, RM 2D
KENT, WA 98032-4429

* * *

[4] THE COURT: You waive reading of the amended information?

MR. FREEBORN: Yes, we do, your Honor.

THE COURT: Pleas of not guilty are entered on behalf of Mr. Freeman; and those pleas are accepted.

MR. COLASURDO: Yes, sir.

THE COURT: Do you have any preliminary motions to make?

MR. COLASURDO: The State would make a motion to exclude witnesses, with the State reserving the right to have the detective present and I believe Detective Vivian Dahlin will be present at counsel table.

THE COURT: Mr. Freeborn, any objection to the State's motion to exclude witnesses?

MR. FREEBORN: I have no problem with that, your Honor. That seems a reasonable motion.

THE COURT: Motion is granted. Any other preliminary matters to take care of now.

MR. COLASURDO: Not at this time, your Honor.

MR. FREEBORN: Your Honor, I do want to address some things and maybe we can do that – we are starting Monday, I assume Monday morning.

THE COURT: Yes.

* * *

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR KING COUNTY

State of Washington,) King County cause
Plaintiff,) No. 02-1-01727-1 KNT
vs.) Kent, WA
Robert Lee Freeman,) February 24, 2003
Defendant.) 9:00 A.M.

VERBATIM REPORT OF PROCEEDINGS BEFORE THE HONORABLE RICHARD F. MCDERMOTT JUDGE OF THE SUPERIOR COURT

APPEARANCES:

Mr. Andy Colasurdo
Deputy Prosecuting Attorney

Mr. Stephen Freeborn
Attorney for Defendant

REPORTED BY: DAVID M. ERWIN, RPR, CSR
OFFICIAL COURT REPORTER
REGIONAL JUSTICE CENTER
401 4TH AVENUE NORTH, RM 2D
KENT, WA 98032-4429

* * *

[4] MR. FREEBORN: They are friends of the family.

MS. PARKMAN: My name is Sunnie Parkman. I am Robert's older sister.

THE COURT: Sunnie Parkman?

MS. PARKMAN: Yes.

THE COURT: Thank you. Welcome. And behind you?

MS. SURRELL: Janet Surrell. I am a friend of his mother.

THE COURT: Well, it's nice to have you here. You are more than welcome to stay. We have an order excluding anyone who might possibly be called as a witness. And so, that's why we inquire. But obviously this is an open proceeding and you are certainly welcome to come and stay. Go ahead, counsel.

MR. COLASURDO: Your Honor, I believe the parties are ready to proceed with the 3.5 hearing.

THE COURT: I have had an opportunity to review your brief, Mr. Colasurdo; and it does appear that there are a number of motions that the State is making, the first of which, obviously is a motion to exclude witnesses, which we just discussed, which was granted last week and the next one is a motion for the 3.5 hearing. So, go ahead and call your witnesses.

* * *

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,) County No.
Plaintiff,) 02-1-01727-1 KNT
) Appeals No. 53169-7-I
vs.) PRETRIAL MOTIONS
ROBERT LEE FREEMAN,)
)
Defendant.)

EXCERPT FROM THE VERBATIM REPORT OF PROCEEDINGS BEFORE THE HONORABLE RICHARD F. McDERMOTT

March 18, 2003

King County Regional Justice Center

Kent, Washington

APPEARANCES

FOR THE PLAINTIFF:	ANDY COLASURDO Deputy Prosecuting Attorney
FOR THE DEFENDANT:	STEPHEN FREEBORN Attorney at Law
REPORTED BY:	BRIDGET O'DONNELL, RPR, CRR Official Court Reporter (206) 205-2530

* * *

[8] And when and if we address that issue during the course of the trial, I'll simply ask you to do it outside of the presence of the jury, give Mr. Colasurdo as

much notice as possible so he can respond, and we'll address it at that time.

Mr. Colasurdo, any other issues?

MR. COLASURDO: I think everyone has a copy of the defendant's statement, and we know what the rulings were for the 3.5 in terms of what portions could and could not be discussed. Just raising that again.

The other thing is – there's two other things The State would ask that during the testimony of Virginia Freeman and Amie Freeman that Ms. Aria Rozotti be excused. Back on April 29th of 2002, Ms. Rozotti was a petitioner for an anti-harassment order before Judge Spector, and the Court, actually, after hearing the testimony, reversed the anti-harassment order that was being sought by Ms. Rozotti, such that it would protect Amie and Virginia, based on what had been presented before her that day. And so –

THE COURT: And who is Ms. Rozotti?

MR. COLASURDO: She is the defendant's fiancee, I believe.

[9] MR. FREEBORN: She's the woman sitting behind me, in the white outfit.

THE COURT: All right.

MR. COLASURDO: So, in fairness to the two witnesses who do have an anti-harassment order, I would ask that she be excluded during their testimony.

THE COURT: Any objection?

MR. FREEBORN: Your Honor, I mean, I don't think it's really relevant to this matter. However, you know, in the interest of just getting this thing running through smoothly, I don't have a problem with her stepping out for that testimony.

THE COURT: All right. I will grant the motion.

MR. COLASURDO: And, lastly – and I think this was something that was somewhat left open – while a lot of the things that have been excluded in terms of what was found in the yard and things of that nature went into when Ms. Freeman brought up the issue of divorce, because of the very prejudicial nature of it, that's been excluded, and we understand that. So she'll try to explain in more general terms why she chose to seek the divorce at the time she asked for it, at the time that she did.

* * *

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff,	) County No.) 02-1-01727-1 KNT) Appeals No. 53169-7-I
vs.	)
ROBERT LEE FREEMAN, Defendant.	)))

VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE
RICHARD F. McDERMOTT

March 17, 2003

King County Regional Justice Center

Kent, Washington

APPEARANCES

FOR THE PLAINTIFF:	ANDY COLASURDO Deputy Prosecuting Attorney
FOR THE DEFENDANT:	STEPHEN FREEBORN Attorney at Law
REPORTED BY:	BRIDGET O'DONNELL, RPR, CRR Official Court Reporter (206) 205-2530

* * *

[21] THE COURT: Okay.

Yes, sir.

A JUROR: Do we report back here to the fourth floor?

THE COURT: Nikki will tell you where to report. She will give you instructions as to where to report.

All right. Make sure you look at your number one more time, remember what your number is, and then we'll ask you to follow Nikki out the door, and she will tell you where to meet her at 1:25.

THE BAILIFF: Please rise for the jury.

(Prospective jurors exit.)

THE COURT: How many people wanted to respond privately?

MR. FREEBORN: We have got some maybes on here, but we've got – 1, 2, 3, 4, 5, 6 – 7 of them, but also I think some of them were excused for cause. I can give you the numbers we've got.

THE COURT: You can just give them to me at 1:25. I'll meet you guys back here at 1:25.

MR. COLASURDO: Are you going to keep the individuals? You've been filling in the bench. You're not going to fill in these seats? You'll keep them spread out?

THE COURT: Yes.

[22] MR. COLASURDO: Okay. Because we both are working off charts, and if you start moving people around –

THE COURT: That's why I told him his witnesses probably can't sit in here, because people stay in the same seats.

MR. COLASURDO: Great.

THE COURT: It's a lot easier for everybody to pick their people that way.

Okay. Any questions?

MR. FREEBORN: I think we're okay.

THE COURT: All right. We'll see you at 1:25. We'll open the doors then.

MR. FREEBORN: Thank you.

THE COURT: Thank you. And we'll bring them out individually, starting with 1. And whoever wanted to respond privately, we'll do that at that time.

MR. COLASURDO: And who's going to lead that questioning? Will it be the Court?

THE COURT: I will start it, but then I'll give you both liberal opportunity to ask the questions. I'll ask the first question or two, and I'll say: You indicated you wanted to speak to us privately. Can you tell us why? And then we'll go from there.

MR. FREEBORN: Do you have an extra – Your Honor, I misplaced – I got some notes.

* * *

No. 09-35929

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT LEE FREEMAN,

Plaintiff-Appellant,

vs.

MAGGIE MILLER-STOUT,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF WASHINGTON

MOTION FOR RECONSIDERATION

Lance M. Hester

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I. *INTRODUCTION*

Pursuant to Circuit Rule 22-1(d), petitioner requests reconsideration of the decision to deny his motion for certificate of appealability because it shows the court overlooked or misapprehended points of law petitioner raised.

II. *QUESTIONS PRESENTED*

1. Whether the court overlooked or misapprehended points of law raised by petitioner in his motion for appealability.

2. Whether petitioner's public trial right deserves review under exiting [sic] case law.

III. *STATEMENT*

A. *Procedural History.*

The petitioner filed a petition for writ of habeas corpus with the United States District Court for the Western District of Washington at Tacoma on November 6, 2007 which was supplemented by counsel on October 31, 2008. The respondent filed a response to the petition for writ of habeas corpus on December 12, 2008. Mr. Freeman filed a reply on January 20, 2009. Magistrate Judge James P. Donohue issued a report and recommendation on July 10, 2009. Petitioner filed objections on July 23, 2009. An order adopting report and recommendation was issued by the District Court dismissing the petition on August 12, 2009 and judgment was entered on that date.

On August 27, 2009, Petitioner filed a Motion for Certificate of Appealability in the District Court. On September 9, 2009, petitioner filed his Notice of

Appeal. On October 16, 2009, the District Court denied the motion. On October 23, 2009, appellant filed a motion for certificate of appealability with this Court. On January 31, 2011, the Ninth Circuit denied petitioner's motion for certificate of appealability and accompanying motion to consider new authority.

IV. *ARGUMENT*

A. WHEN THE COURT DENIED PETITIONER'S MOTION FOR CERTIFICATE OF APPEALABILITY AND ACCOMPANYING MOTION, THE COURT OVERLOOKED AND MISAPPREHENDED THE POINTS OF LAW PETITIONER HAD RAISED IN HIS MOTIONS.

Of particular importance to that motion was the issue of Mr. Freeman being denied a public trial.

As it relates to the public trial right, among the factual and legal arguments Petitioner brought to the attention of this court was the following: the District Court recognized the trial court failed to make required findings when a member of the public was excused from the trial.

Since the time of addressing the District Court, [sic] United States Supreme Court decided *Presley v. Georgia*, ___ U.S. ___, 130 S.Ct. 721, 723, 175 L.Ed.2d 675 (2010). It held that under the First and "Sixth Amendments, voir dire of prospective jurors *must* be open to the public and that this requirement is "binding on the States." Petitioner moved this court to consider *Presley* while determining the appealability of Petitioner's case. On the heels of *Presley*, applying constitutional analysis, the Washington Court of Appeals decided *State v. Leyerly*, 158 Wn.App 474, 242 P.3d 921 (2010). *Leyerly* further establishes defense counsel need not object to preserve the matter for further review.

Petitioner's public trial issue was not fully addressed by the state court appellate process. However, as argued in previous materials, it was brought to the lower courts attention as soon as the issue was made relevant by other state court authority.

Had the state court allowed review under appellate counsel's supplemental argument, citing *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004), Petitioner's case would have the benefit of a record for review. *See Report and Recommendation* at 4. The subsequent record addressing the public trial right is thus incomplete. Nevertheless, the District Court took it upon itself to address the issue despite the incomplete record and then it ruled against Petitioner. *See, Report and Recommendation*, at 18. In accordance with the authority cited above, and in recognition of the importance of the authority published since the adoption of the District Court's *Report and Recommendation* (including United States Supreme Court authority and Washington state court authority applying those principles) this court should see that the law has developed significantly since Petitioner first attempted to address this most important issue to his case. It can also be stated that

Petitioner's case fits within the current analysis under the *Leyerly* opinion, and that Petitioner will be denied justice without fully addressing this ripe and relevant constitutional issue.

This court appears to have overlooked the above issues when it denied Petitioner's motion for appealability and Petitioner requests reconsideration to address this oversight. It is in the interest of justice for the court to re-hear this issue and to grant Petitioner a hearing on this issue.

V. *CONCLUSION*

Mr. Freeman respectfully requests that this court reconsider the decision denying his motion for certificate of appealability, grant review and determine whether Mr. Freeman's public trial issue, at a minimum, is appealable.

RESPECTFULLY SUBMITTED this 11 day of February, 2011.

HESTER LAW GROUP, INC. P.S.
Attorneys for Appellant

By: /s/ Lance M. Hester
Lance M. Hester
WSB #27813

[Certificate Of Service Omitted In Printing]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT LEE FREEMAN, Petitioner, vs. MAGGIE MILLER-STOUT, Respondent.	)	No. 09-35929 ADDITIONAL AUTHORITY IN SUPPORT OF MOTION FOR CERTIFICATE OF APPEALABILITY TO THE NINTH CIRCUIT COURT OF APPEALS

1. Identity of Moving Party

Petitioner Robert Lee Freeman, above-named, asks for the relief designated in Part 1.

2. Statement of Relief Sought

Mr. Freeman respectfully requests that this court consider the additional authority set forth below and grant his motion for a certificate of appealability in this matter.

3. Facts Relevant to Motion

The petitioner filed a petition for writ of habeas corpus with the United States District Court for the Western District of Washington at Tacoma on November 6, 2007 which was supplemented by counsel on October 31, 2008. The respondent filed a response to the petition for writ of habeas corpus on December 12, 2008. Mr. Freeman filed a reply on January 20,

2009. Magistrate Judge James P. Donohue issued a report and recommendation on July 10, 2009. Petitioner filed objections on July 23, 2009. An order adopting report and recommendation was issued by the District Court dismissing the petition on August 12, 2009 and judgment was entered on that date.

On August 27, 2009, Petitioner filed a Motion for Certificate of Appealability in the District Court. On September 9, 2009, petitioner filed his Notice of Appeal. On October 16, 2009, the District Court denied the motion. On October 23, 2009, appellant filed a motion for certificate of appealability with this Court.

4. Grounds for Relief and Argument

Appellant provides the following additional authority in support of his motion for certificate of appealability, *Presley v. Georgia*, ___ U.S. ___, 130 S.Ct. 721, 175 L.Ed2d 675 (2010).

The above authority was recently handed down by the United States Supreme Court. The opinion addresses the public trial issue that is before this court, but has yet to receive sufficient attention from lower courts. The issue deserves to be addressed. This opinion broadens the law on this issue and serves as stare decisis as to all cases subsequently under review. It is in the interest of justice that this court now review this new authority along with its review of the pending briefing in the instant case.

5. Conclusion

The court is reminded the petitioner "need not show that he should prevail on the merits . . . Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court *could* resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." *U.S. v. Mitchell,* 216 F.3d at 1130, *citing Barefoot,* supra. Petitioner has made such a showing herein. Accordingly, based on his prior motion and this additional authority, petitioner asks this court to order a Certificate of Appealability and allow his matter to proceed to the Ninth Circuit for further review.

DATED this 15 day of September, 2010.

HESTER LAW GROUP, INC. P.S.
Attorneys for Petitioner

By: /s/ Lance Hester
Lance M. Hester
WSB #27813

[Certificate Of Service Omitted In Printing]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT LEE FREEMAN, Petitioner, vs. MAGGIE MILLER-STOUT, Respondent.	[09-35929] Western District of Washington Case No. CV07-01805-JLR-JPD MOTION FOR CERTIFICATE OF APPEALABILITY TO THE NINTH CIRCUIT COURT OF APPEALS

1. Identity of Moving Party

Petitioner Robert Lee Freeman, above-named, asks for the relief designated in Part 1.

2. Statement of Relief Sought

Mr. Freeman respectfully requests that this court grant his motion for a certificate of appealability in this matter.

3. Facts Relevant to Motion

The petitioner filed a petition for writ of habeas corpus with the United States District Court for the Western District of Washington at Tacoma on November 6, 2007 which was supplemented by counsel on October 31, 2008. The respondent filed a response to the petition for writ of habeas corpus on December 12, 2008. Mr. Freeman filed a reply on January 20,

2009. Magistrate Judge James P. Donohue issued a report and recommendation on July 10, 2009. Petitioner filed objections on July 23, 2009. An order adopting report and recommendation was issued by the District Court dismissing the petition on August 12, 2009 and judgment was entered on that date.

On August 27, 2009, Petitioner filed a Motion for Certificate of Appealability in the District Court. As of the filing of this Motion to the 9th Circuit, the District Court has not yet issued its Order on Appealability. On September 9, 2009, petitioner filed his Notice of Appeal. This motion now follows requesting the 9th Circuit issue an Order of Appealability as to Petitioner's claims.

4. Grounds for Relief and Argument

Based upon the following issues, the court should order a Certificate of Appealability.

A. ISSUES.

1. Whether petitioner was denied the right to effective assistance of counsel.

2. Whether petitioner was denied the right to a public trial

3. Whether admitting the complaining witness's diary was reversible error.

4. Whether the state engaged in prosecutorial misconduct.

B. ARGUMENT

1. THIS COURT SHOULD ISSUE A CERTIFICATE OF APPEALABILITY AS MR. FREEMAN MAKES A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT.

A fundamental element of due process of law is the defendant's right to present his own witnesses to establish a defense. *Washington v. Texas,* 388 U.S. 14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019 (1967). This right gains special importance when the evidence is critical to the accused's defense. *Chambers v. Mississippi,* 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

This right, however, is not absolute. "In exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers,* 410 U.S. at 302, 93 S.Ct. at 1049.

The Supreme Court has not formulated any "flat rule" in evaluating the constitutionality of whether a state rule of procedure or evidence is unconstitutional. *Perry v. Rushen,* 713 F.2d 1447, 1450 (9th Cir. 1983). The Court instead applies a balancing test weighing the defendant's interest in presenting the evidence against the state's interest in reliable and efficient trials. *Perry,* 713 F.2d at 1451. "Where the state's interest is strong, only the exclusion of critical, reliable, and highly probative evidence will violate due process. When the state interest is weaker, less significant evidence is protected. *Perry,* 713 F.2d at 1452. As the court explained:

> In evaluating the significance of the evidence, the court should consider all the circumstances: its probative value on the central issue, its reliability, whether it is capable of evaluation by the finder of fact, whether it is the sole evidence on the issue or merely cumulative, and whether it constitutes a major part of the attempted defense. The weight of the state's interest likewise depends on many factors. The Court must determine the purpose of the rule, its importance, how well the rule implements this purpose, and how well the purpose applies in the case at hand. The court must give due weight to the substantial state interest in preserving orderly trials, in judicial efficiency, in excluding unreliable or prejudicial evidence.

Perry, 713 F.2d at 1452-53.

In *Barefoot v. Estelle,* 463 U.S. 880, 893, 103 S.Ct. 3383, 77 L.Ed.2d 1090, the court held that a "certificate of probable cause requires petitioner to make a 'substantial showing of the denial of [a] federal right. *Citing Stewart v. Beto,* 454 F.2d 268, 270, n.2 (5th Cir. 1971), cert denied, 406 U.S. 925 (1972). Specifically, the court found the standard to include the following:

> In requiring a 'question of some substance', or a 'substantial showing of the denial of [a]

> federal right,' obviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court *could* resolve the issues [in a different manner]; or that the questions are 'adequate to deserve encouragement to proceed further.'

Id. at 893, further citations omitted.

More recently, the standard above has been articulated in the widely accepted case of *U.S. v. Mitchell,* 216 F.3d 1126 (DC Cir. 2000). The inquiry according to the *Mitchell* court is as follows: in order to determine whether a petitioner should receive a certificate of appealability to pursue his appeal, the court must ask whether he "has made a substantial showing of the denial of a constitutional right." *Citing* 28 U.S.C. 2253(c)(2). "The petitioner need not show that he should prevail on the merits . . . Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court *could* resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." *U.S. v. Mitchell,* 216 F.3d at 1130, *citing Barefoot, supra.*

Here, Mr. Freeman can make a substantial showing of several denials of constitutional rights. Further, he can demonstrate that the issues for which he was previously denied relief are debatable among jurists of reason, and that a court could resolve the issues differently, or that the questions are adequate to deserve encouragement to proceed further.

a. Ineffective assistance of counsel

Mr. Freeman was denied his right to effective assistance of counsel. As noted, the District Court adopted the Report and Recommendation of the magistrate. In the report and recommendation, the court found that petitioner's trial counsel made use of the victim's diary that was admitted at trial, and accordingly, he cannot now claim counsel was ineffective. *See* Report and Recommendation at 9. This ignores the fact that counsel actually objected to the diary's admission in pretrial filings and argument.

As noted in briefings to the District Court, *Strickland* does not require a defendant to prove it more likely than not that the outcome would have been altered but for counsel's unprofessional errors, just that there be a reasonable probability the result would have been different. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Woodford v. Viscotti,* 537 U.S. 19, 22-23, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002).

A Petitioner such as Mr. Freeman must show that the state court applied *Strickland* to the facts of his case in an objectively unreasonable manner. *Id.* at 24.

In the present case, petitioner argued the following constituted ineffective assistance of counsel: failure to interview witnesses, failure to object to Amie's diary and failure to request the court limit its use, failure to object to Virginia's testimony, failure to Protect Mr. Freeman's public trial right and appellate counsel's late submission to the court of appeals.

Each of these allegations is meritorious. In short, every one of these assertions is at a minimum "debatable among jurists of reason;" and a court "*could* resolve the issues [in a different manner]. . . ."

For instance, a jurist of reason could have found trial counsel failed to make a reasonable inquiry into his client's case when counsel failed to interview the two most significant witnesses. A court could have found that counsel's failure to investigate in this situation and counsel's failure to address evidentiary matters such as DNA before trial undermined the confidence in the verdict as discussed in *Avila v. Galaza,* 297 F.3d 911 (9th Cir. 2002), and *Lord v. Wood,* 184 F.3d 1083 (9th Cir. 1999) in petitioner's briefings to the District Court.

Counsel's failure to renew his objection to Amie's diary and failure to request limiting its use were substantial failures in light of *State v. Coffey,* 8 Wn.2d 504, 112 P.2d 989 (1941), as cited in petitioner's District Court briefings. As indicated in prior briefings, trial counsel filed objections to the diary's admission, and the court denied the motion. *See* Petitioner's Reply Brief at 19:16-18, *citing* Exhibit 5 (Order on Pretrial Motion) 48-49. This was therefore a continuing objection to the diary's use. Admittedly, trial counsel attempted to make use of the admitted diary at trial. He probably felt he had no other choice given the fact that it was admitted already. But the fact remains, the diary never should have come into evidence, and the fact that it did enter into evidence is in part attributable to trial counsel's failure to aggressively register his objection to the diary at all appropriate junctures.

Reviewing the transcripts of proceedings, it appears as though counsel felt it was a foregone conclusion that the diary was admissible. *See* RP 3/24/2003, 427. He appeared to believe that because the diary was "her writing" it was somehow automatically admissible. *Id.* This mistaken belief of the law illustrates counsel's ineffectiveness. In actuality, as indicated in the opening briefing on this subject matter, the diary was inadmissible under the *Coffey* opinion and accordingly should have been barred under ER 404(b) as well. A reasonably minded jurist could have adopted this conclusion and reversed matters in the District Court Habeas proceedings.

The issue of Mr. Freeman's denial of a public trial is discussed in a subsequent section of this briefing. In short, trial counsel did nothing to protect Mr. Freeman from being denied a public trial on the basis shown. Counsel's failure to cause the court to adhere to the *Bone-Club* and *Sherlock* standards and trial counsel's failure to note an objection to the removal of the public from the trial constitute deficient performance upon a constitutional issue.

As previously referenced, petitioner's counsel on appeal filed supplemental authority that covered the public trial issue. Had counsel more timely filed that piece, the Court of Appeals would have had no choice but to accept the issue for review. However, appellate counsel took so long to file the materials that they appeared before the Court of Appeals after all briefing deadlines had lapsed. This constituted deficient performance, as indicated in Counsel's Supplemental Memorandum in Support of Writ of Habeas Corpus. Mr. Freeman has been prejudiced by this deficiency to the extent that arguably, at least according to the state in these proceedings, his public trial issue has not been exhausted because it has not appropriately been exposed to the Court of Appeals. In fact, as previously indicated, its review was limited to a footnote, to which further review was limited. A reasonably minded jurist could have found that (a) petitioner's public trial right was violated (see below), and (b) that due to counsel's deficient performance, the matter was not properly brought before the court of appeals. Such conclusions would have properly brought the matter before the District Court, and those conclusions would have been reasonable.

Under traditional due process principles, cumulative error also warrants habeas relief where the errors have so infected the trial with unfairness as to make the resulting conviction a denial of due process. *Parle v. Runnels*, 505 F.3d 922 (9th Cir. 2007), *citing Chamber* [sic] *v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). Such infection occurs when the combined effect of the errors had a "substantial and injurious effect" on the jury's verdict. *Parle, Id., citing Brecht v. Abrahamson,* 207 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). Given the extensive list of issues constituting ineffective assistance of counsel in the present case, a reasonable jurist could find the combined effect of individual harmless errors to have rendered petitioner's criminal defense far less persuasive than it might otherwise have been, and resulting in a conviction that violates due process. *Parle, Id.* While the reviewing court did not find cumulative error, a reasonably minded jurist could have found cumulative, prejudicial, harmful error.

As argued in District Court briefing, in sexual abuse cases, the courts have recognized that the cumulative effect of errors can be magnified and must be even more carefully scrutinized. *See Martin v. Parker,* 11 F.3d 613, 616-617 (6th Cir. 1993).

For all of the above reasons related to ineffective assistance of counsel claims, this court should now find petitioner's case appealable under the above-articulated standards. Accordingly, the court should issue a Certificate of Appealability.

b. Public Trial Claim

Petitioner's public trial claim is a constitutional claim, rooted in the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 22 of the Washington State Constitution.

The public trial issue was thoroughly addressed in District Court briefings, and the Report and Recommendation recognized arguments on all sides of the issue. Petitioner stands by the arguments and authority he previously presented as to this issue. Importantly, in the present case the District Court explicitly recognized " . . . the trial court did not make express findings regarding reasonable alternative to temporarily excluding Petitioner's fiancé,. . . ." *See Report and Recommendation*, 18. Given that this part of the *Sherlock* and *Bone-Club* analysis was deficient in the present case, it is rather fair to assume on this basis alone that petitioner has demonstrated that this issue is debatable among jurists of reason and that a court *could* resolve the issue in a different manner than the District Court.

Additionally, the District Court's reasoning on its conclusions as to the other areas of the *Sherlock* and *Bone-Club* analysis could have resulted in different conclusions by a different jurist of reason. For example, a jurist of reason could have concluded that the trial court was competent to supervise whether Mr. Freeman's fiancé breached the previous order during the witness's testimony. The District Court ignored the argument that courts routinely permit similarly situated parties into the same courtroom environment in other situations. Rather, it concluded that the court was without any reasonable alternatives to excluding petitioner's fiancé. While the District Court justified the trial court's actions, there is no question that the District Court acknowledged that elements of the process to which petitioner was entitled were missing. As such, it is fair to conclude the matter is appealable under the previously articulated standards.

c. The complaining witness's diary

The diary was addressed by the Report and Recommendation in the context of an ineffective assistance of counsel claim. However, petitioner also addressed this issue separately, arguing that the diary should never have come into evidence. As indicated in petitioner's filings, Petitioner's counsel actually objected to the diary's admissibility in pretrial motions. *See Petitioner's Reply Brief* at 19:16-18. While trial counsel's performance was deficient and disappointing in following up on his original objection during the course of trial, the fact of the matter, as previously argued, is that counsel preserved the objections by making the objection in the first place. *See Supplemental Memorandum of Counsel,* 11-12. Once the court ruled on its admissibility, counsel appears to have tried to use the diary in petitioner's defense. However, that attempt should not have been used against petitioner as it was in the Report and Recommendation. A jurist of reasonable mind could certainly find that the diary was inadmissible and further, that defense counsel did not waive his objection to the diary by attempting to argue from it or use it during trial.

Petitioner's position remains that the diary was inadmissible under *State v. Coffey,* 8 Wn.2d 504, 112 P.2d 989 (1941), an unambiguous opinion. This is a constitutional issue as it addresses the confrontation clause of the United States Constitution and violates the rule against hearsay. Petitioner stands by his previously argued position that its admission into the trial constituted reversible error. A jurist of reasonable mind could certainly agree, and under the standards previously articulated, this court should order a Certificate of Appealability on this ground as well.

d. Prosecutorial Misconduct

The Report and Recommendation found no prosecutorial misconduct of a constitutional dimension sufficient to grant the petition for writ of habeas corpus. Petitioner has argued the possibility of evidence mishandling, and foundational issues pertaining to the DNA evidence purportedly collected from Amie Freeman's bedroom. Petitioner has argued prosecutor "vouching," false testimony, and producing unsworn testimony. These allegations constitute violations of petitioner's right to constitutional due process. The Report and Recommendation disputes whether these were acts of misconduct, then concludes that regardless, the acts "did not so infect the trial with unfairness as to make Petitioner's resulting conviction a denial of due process." *See Report and Recommendation,* 15-16. But what the court's opinion fails to recognize is what it cites as "overwhelming" trial evidence includes the long list of evidence elicited through the acts of prosecutorial misconduct cited at length in petitioner's opening memorandum, and other District Court filings.

DNA evidence, preserving the integrity of evidence, chain of custody, and properly eliciting testimonial evidence are important fundamentals to which all defendants enjoy certain rights. Petitioner has accurately argued the importance of these rights and how the violations of these rights have prejudiced his case, including his inability to conduct independent testing on evidence he cannot acquire through discovery. When a prosecutor vouches and acts as an unsworn witness, a defendant is unable to confront the witness using the guarantees of cross-examination.

These alleged violations of due process under the United States Constitution could have resulted in a different conclusion by a reasonably minded jurist. As such, this court should order a Certificate of Appealability to allow petitioner appropriate further review of this claim.

5. Conclusion

The court is reminded the petitioner "need not show that he should prevail on the merits . . . Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court *could* resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." *U.S. v. Mitchell,* 216 F.3d at 1130, *citing Barefoot,* supra. Petitioner has made such a showing herein. Accordingly, petitioner asks this court to order a Certificate of Appealability and allow his matter to proceed to the Ninth Circuit for further review.

DATED this 10th day of September, 2009.

HESTER LAW GROUP, INC. P.S.
Attorneys for Petitioner

By: /s/ Lance M. Hester
Lance M. Hester
WSB #27813

[Certificate Of Service Omitted In Printing]

Honorable District Court James L. Robart
Honorable Magistrate Judge James P. Donohue

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ROBERT LEE FREEMAN, Petitioner, vs. MAGGIE MILLER-STOUT, Respondent.	No. CV07-01805-JLR-JPD MOTION FOR CERTIFICATE OF APPEALABILITY PURSUANT TO LOCAL RULE 22 NOTED FOR: 9/4/09

1. Identity of Moving Party

Petitioner Robert Lee Freeman, above-named, asks for the relief designated in Part 1 [sic].

2. Statement of Relief Sought

Mr. Freeman respectfully requests that this court grant his motion for a certificate of appealability in this matter.

3. Facts Relevant to Motion

The petitioner filed a petition for writ of habeas corpus with the United States District Court for the Western District of Washington at Tacoma on November 6, 2007 which was supplemented by counsel on October 31, 2008. The respondent filed a response to the petition for writ of habeas corpus on December

12, 2008. Mr. Freeman filed a reply on January 20, 2009. Magistrate Judge James P. Donohue issued a report and recommendation on July 10, 2009. Petitioner filed objections on July 23, 2009. An order adopting report and recommendation was issued by the District Court dismissing the petition on August 12, 2009 and judgment was entered on that date.

4. Grounds for Relief and Argument

Based upon the following issues, the court should order a Certificate of Appealability.

A. ISSUES.

1. Whether petitioner was denied the right to effective assistance of counsel.

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3. Whether admitting the complaining witness's diary was reversible error.

4. Whether the state engaged in prosecutorial misconduct.

B. ARGUMENT

1. THIS COURT SHOULD ISSUE A CERTIFICATE OF APPEALABILITY AS MR. FREEMAN MAKES A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT.

A fundamental element of due process of law is the defendant's right to present his own witnesses to establish a defense. *Washington v. Texas,* 388 U.S. 14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019 (1967). This right gains special importance when the evidence is critical to the accused's defense. *Chambers v. Mississippi,* 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

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Each of these allegations is meritorious. In short, every one of these assertions is at a minimum "debatable among jurists of reason;" and a court "*could* resolve the issues [in a different manner]. . . ."

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Counsel's failure to renew his objection to Amie's diary and failure to request limiting its use were substantial failures in light of *State v. Coffey*, 8 Wn.2d 504, 112 P.2d 989 (1941), as cited in petitioner's District Court briefings. As indicated in prior briefings, trial counsel filed objections to the diary's admission, and the court denied the motion. *See* Petitioner's Reply Brief at 19:16-18, *citing* Exhibit 5 (Order on Pretrial Motion) 48-49. This was therefore a continuing objection to the diary's use. Admittedly, trial counsel attempted to make use of the admitted diary at trial. He probably felt he had no other choice given the fact that it was admitted already. But the fact remains, the diary never should have come into evidence, and the fact that it did enter into evidence is in part attributable to trial counsel's failure to aggressively register his objection to the diary at all appropriate junctures.

Reviewing the transcripts of proceedings, it appears as though counsel felt it was a foregone conclusion that the diary was admissible. *See* RP 3/24/2003, 427. He appeared to believe that because the diary was "her writing" it was somehow automatically admissible. *Id.* This mistaken belief of the law illustrates counsel's ineffectiveness. In actuality, as indicated in the opening briefing on this subject matter, the diary was inadmissible under the *Coffey* opinion and accordingly should have been barred under ER 404(b) as well. A reasonably minded jurist could have adopted this conclusion and reversed matters in the District Court Habeas proceedings.

The issue of Mr. Freeman's denial of a public trial is discussed in a subsequent section of this briefing. In short, trial counsel did nothing to protect Mr. Freeman from being denied a public trial on the basis shown. Counsel's failure to cause the court to adhere to the *Bone-Club* and *Sherlock* standards and trial counsel's failure to note an objection to the removal of the public from the trial constitute deficient performance upon a constitutional issue.

As previously referenced, petitioner's counsel on appeal filed supplemental authority that covered the public trial issue. Had counsel more timely filed that piece, the Court of Appeals would have had no choice but to accept the issue for review. However, appellate counsel took so long to file the materials that they appeared before the Court of Appeals after all briefing deadlines had lapsed. This constituted deficient performance, as indicated in Counsel's Supplemental Memorandum in Support of Writ of Habeas Corpus. Mr. Freeman has been prejudiced by this deficiency to the extent that arguably, at least according to the state in these proceedings, his public trial issue has not been exhausted because it has not appropriately been exposed to the Court of Appeals. In fact, as previously indicated, its review was limited to a footnote, to which further review was limited. A reasonably minded jurist could have found that (a) petitioner's public trial right was violated (see below), and (b) that due to counsel's deficient performance, the matter was not properly brought before the court of appeals. Such conclusions would have properly brought the matter before the District Court, and those conclusions would have been reasonable.

Under traditional due process principles, cumulative error also warrants habeas relief where the errors have so infected the trial with unfairness as to make the resulting conviction a denial of due process. *Parle v. Runnels,* 505 F.3d 922 (9th Cir. 2007), *citing Chamber* [sic] *v. Mississippi,* 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). Such infection occurs when the combined effect of the errors had a "substantial and injurious effect" on the jury's verdict. *Parle, Id., citing Brecht v. Abrahamson,* 207 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). Given the extensive list of issues constituting ineffective assistance of counsel in the present case, a reasonable jurist could find the combined effect of individual harmless errors to have rendered petitioner's criminal defense far less persuasive than it might otherwise have been, and resulting in a conviction that violates due process. *Parle, Id.* While the reviewing court did not find cumulative error, a reasonably minded jurist could have found cumulative, prejudicial, harmful error.

As argued in District Court briefing, in sexual abuse cases, the courts have recognized that the cumulative effect of errors can be magnified and must be even more carefully scrutinized. *See Martin v. Parker,* 11 F.3d 613, 616-617 (6th Cir. 1993).

For all of the above reasons related to ineffective assistance of counsel claims, this court should now find petitioner's case appealable under the above articulated standards. Accordingly, the court should issue a Certificate of Appealability.

b. Public Trial Claim

Petitioner's public trial claim is a constitutional claim, rooted in the Sixth and Fourteenth Amendments to the United States Constitution and Article I [sic], Section 22 of the Washington State Constitution.

The public trial issue was thoroughly addressed in District Court briefings, and the Report and Recommendation recognized arguments on all sides of the issue. Petitioner stands by the arguments and authority he previously presented as to this issue. Importantly, in the present case the District Court explicitly recognized " . . . the trial court did not make express findings regarding reasonable alternative to temporarily excluding Petitioner's fiancé,. . . ." *See Report and Recommendation*, 18. Given that this part of the *Sherlock* and *Bone-Club* analysis was deficient in the present case, it [sic] rather fair to assume on this basis alone that petitioner has demonstrated that this issue is debatable among jurists of reason and that a court *could* resolve the issue in a different manner than the District Court.

Additionally, the District Court's reasoning on its conclusions as to the other areas of the *Sherlock* and *Bone-Club* analysis could have resulted in different conclusions by a different jurist of reason. For example, a jurist of reason could have concluded that the trial court was competent to supervise whether Mr. Freeman's fiancé breached the previous order during the witness's testimony. The District Court ignored the argument that court's [sic] routinely permit similarly situated parties into the same courtroom environment in other situations. Rather, it concluded that the court was without any reasonable alternatives to excluding petitioner's fiancé. While the District Court justified the trial court's actions, there is no question that the District Court acknowledged that elements of the process to which petitioner was entitled were missing. As such, it is fair to conclude the matter is appealable under the previously articulated standards.

c. The complaining witness's diary

The diary was addressed by the Report and Recommendation in the context of an ineffective assistance of counsel claim. However, petitioner also addressed this issue separately, arguing that the diary should never have come into evidence. As indicated in petitioner's filings, Petitioner's counsel actually objected to the diary's admissibility in pretrial motions. *See Petitioner's Reply Brief* at 19:16-18. While trial counsel's performance was deficient and disappointing in following up on his original objection during the course of trial, the fact of the matter, as previously argued, is that counsel preserved the objections by making the objection in the first place. *See Supplemental Memorandum of Counsel,* 11-12. Once the court ruled on its admissibility, counsel appears to have tried to use the diary in petitioner's defense. However, that attempt should not have been used against petitioner as it was in the Report and Recommendation. A jurist of reasonable mind could certainly find that the diary was inadmissible and further, that defense counsel did not waive his objection to the diary by attempting to argue from it or use it during trial.

Petitioner's position remains that the diary was inadmissible under *State v. Coffey,* 8 Wn.2d 504, 112 P.2d 989 (1941), an unambiguous opinion. This is a constitutional issue as it addresses the confrontation clause of the United States Constitution and violates the rule against hearsay. Petitioner stands by his previously argued position that its admission into the trial constituted reversible error. A jurist of reasonable mind could certainly agree, and under the standards previously articulated, this court should order a Certificate of Appealability on this ground as well.

d. Prosecutorial Misconduct

The Report and Recommendation found no prosecutorial misconduct of a constitutional dimension sufficient to grant the petition for writ of habeas corpus. Petitioner has argued the possibility of evidence mishandling, and foundational issues pertaining to the DNA evidence purportedly collected from Amie Freeman's bedroom. Petitioner has argued prosecutor "vouching," false testimony, and producing unsworn testimony. These allegations constitute violations of petitioner's right to constitutional due process. The Report and Recommendation disputes whether these were acts of misconduct, then concludes that regardless, the acts "did not so infect the trial with unfairness as to make Petitioner's resulting conviction a denial of due process." *See Report and Recommendation,* 15-16. But what the court's opinion fails to recognize is what it cites as "overwhelming" trial evidence includes the long list of evidence elicited through the acts of prosecutorial misconduct cited at length in petitioner's opening memorandum, and other District Court filings.

DNA evidence, preserving the integrity of evidence, chain of custody, and properly eliciting testimonial evidence are important fundamentals to which all defendants enjoy certain rights. Petitioner has accurately argued the importance of these rights and how the violations of these rights have prejudiced his case, including his inability to conduct independent testing on evidence he cannot acquire through discovery. When a prosecutor vouches and acts as an unsworn witness, a defendant is unable to confront the witness using the guarantees of cross examination.

These alleged violations of due process under the United States Constitution could have resulted in a different conclusion by a reasonably minded jurist. As such, this court should order a Certificate of Appealability to allow petitioner appropriate further review of this claim.

5. Conclusion

The court is reminded the petitioner "need not show that he should prevail on the merits . . . Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court *could* resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." *U.S. v. Mitchell,* 216 F.3d at 1130, *citing Barefoot,* supra. Petitioner has made such a showing herein. Accordingly, petitioner asks this court to order a Certificate of Appealability.

DATED this 27th day of August, 2009.

HESTER LAW GROUP, INC. P.S.
Attorneys for Petitioner

By: /s/ Lance M. Hester
Lance M. Hester
WSB #27813

[Certificate Of Service Omitted In Printing]

Honorable District Court [sic] James L. Robart
Honorable Magistrate Judge James P. Donohue

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ROBERT LEE FREEMAN, Petitioner, vs. MAGGIE MILLER-STOUT, Respondent.	No. CV07-01805-JLR-JPD PEITTIONER'S [sic] OBJECTIONS TO REPORT AND RECOMMENDATION

COMES NOW the petitioner herein, Robert Freeman, by and through his attorneys of record, the Hester Law Group, Inc., P.S., and respectfully objects to the entire report and recommendation filed July 10, 2009. Pursuant to Fed.R.Civ.P. 72(b), and 28 USC 636, Petitioner respectfully files the following objections to the magistrate's report and recommendation filed on July 10, 2009.

OBJECTIONS

Petitioner respectfully objects to the entire report and recommendation insofar as it in any way differs from the facts or argument previously presented by Petitioner.

Objection 1: Objection to the court's refusal to allow Petitioner to supplement the record. On P.6, footnote 2, the court references its refusal to consider the voir dire of the jury issue that relates to both the public trial issue and ineffective assistance of counsel. The court cited the raising of these issues as untimely. This objection is based on the fact that the matters were timely raised, as indicated in the motion to expand the record to consider the relevant materials. In short, it was Petitioner's first actual opportunity to raise the issue, and the court should have, in the interest of justice, allowed the record to be appropriately expanded for a full and complete review of the issues in Mr. Freeman's case. Accordingly, Petitioner objects to the Order Denying Plaintiff's Motion to Expand the Record. *See* also, Order Denying Plaintiff's Motion to Expand the Record, filed November 18, 2008. CR 22.

Objection 2: Petitioner objects to the court's recitation of facts. The factual statement by the Magistrate is incomplete in several ways. For instance, it fails to recognize chain of custody issues that existed at trial. The factual statement recognizes matters sympathetic to the complaining witness's perspective, but it fails to acknowledge the inconsistencies and points that were drawn out in favor of Mr. Freeman's defense.

Objection 3: Petitioner objects to the court's decision related to ineffective assistance of counsel claims. In short, Petitioner's claims in fact met [sic] the *Strickland* test and the court's conclusions are erroneous.

Trial counsel's failure to object or to propose a limitation to the use of Amie Freeman's diary is inexcusable. Under *State v. Coffey,* 8 Wn.2d 504, 112 P.2d 989 (1941), the diary was inadmissible evidence, with reversal being the appropriate remedy. Further, Petitioner objects to the Court's failure to find trial counsel was ineffective when he did nothing to prevent the jury from considering the diary during deliberations. Petitioner has shown the admissibility of the diary was prejudicial. In Petitioner's Memorandum In Support of Petition for Writ of Habeas Corpus, he cited that counsel "abandoned his defense" upon the admission of the diary, and articulated several resulting prejudicdes [sic]. *See* Petitioner's Memorandum in Support of Petition for Writ of Habeas Corpus, 18-22.

The court erred when it failed to find trial counsel ineffective for failing to object to Virginia's testimony about the several reasons she feared Petitioner and her removal of him from the home.

The court erred when it failed to find trial counsel ineffective for failing to interview Amie and Virginia prior to trial. The court relied on facts that Petitioner believes are untrue. Counsel for Mr. Freeman never interviewed Amie freeman [sic] as part of his prior involvement with the parties. And, any contact with Virginia Freeman was unrelated to the charges Mr. Freeman faced in the present case.

The above errors included prejudice to Petitioner. And this prejudice can be seen throughout the arguments in Petitioner and counsel's briefs.

Objection 4: Petitioner objects to the court's Report and Recommendation as to Prosecutorial Misconduct Claims. Petitioner showed in his briefing that the carpet samples actually taken from the Freeman home were withheld from the defense. He objects to the court's failure to properly review the matter. And Petitioner asserts that an insufficient foundation and chain of custody existed at the time DNA evidence was admitted. Further, Petitioner asserts that the court's findings are speculative and he asserts that prejudice resulted as well. The Report & Recommendation fails to recognize that Virginia Freeman was involved in the collection of evidence as well. Petitioner objects to the court's finding that the prosecutor's closing argument did not amount to prohibited witness vouching. Beyond witness vouching, the prosecutor's words invited the jury to speculate on matters not in evidence. Petitioner objects to the Report & Recommendation's failure to address the prosecutor expressing personal opinions. Petitioner objects to the court's findings about the prosecutor introducing false testimony between Amie and Rose Russell, and disagrees as to the court's position that the testimony was favorable to Petitioner. Petitioner objects to the court's disagreement to his assertion that the prosecutor became an "unsworn" witness at trial. Whether intentional or not, the prosecution facilitated testimony that appeared to include the prosecution as a witness in the case. These denials amounted to a denial of due process, and Petitioner objects to findings to the contrary. Petitioner asserts that his Petition and filings in the instant case show the prosecutions [sic] actions had a substantial and injurious effect on or influence in determining the jury's verdict; he further asserts that the evidence was not "overwhelming" at trial, and he objects to the Court's findings to the contrary.

Objection 5: Petitioner objects to the court's Report and Recommendation failing to find his right to a public trial was violated by the trial court. As to this issue, Petitioner further objects to the court failing to find that his trial attorney's failure to properly object constituted ineffective assistance of counsel. And, as indicated previously, Petitioner objects to the court's refusal to give full consideration to this claim by its refusal to allow Petitioner to expand the record in the manner previously noted. This issue has proven frustrated by Petitioner's efforts to have the matter properly heard in State court. The matter has never received proper judicial attention. And accordingly, Mr. Freeman should be given an opportunity to have a full evidentiary hearing and expansion of this part of the record. Because of these denials, Petitioner objects. He further objects to the Court not addressing appellate counsel's ineffectiveness for failing to promptly bring this issue to the appellate court's attention, as that appears to be a significant reason for this issue never being properly litigated.

Petitioner's case presented a scenario that was void of any "order" in the courtroom issues from existing case law allowing partial closures. Petitioner also asserts that there did not exist a "substantial reason" for the partial courtroom closure, as the situation at hand did not prove to have the relevant parties to the anti-harassment order interacting with each other. And Petitioner's case, by the Magistrate's own admission in the Report and Recommendation, lacked the requisite due process as outlined in the same Report and Recommendation.

DATED this 23, day of July, 2009.

HESTER LAW GROUP, INC. P.S.
Attorneys for Petitioner

By: /s/ Lance M. Hester
Lance M. Hester
WSB #27813

[Certificate Of Service Omitted In Printing]

Honorable District Court [sic] James L. Robart
Honorable Magistrate Judge James P. Donohue

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ROBERT LEE FREEMAN,
Petitioner,
vs.
MAGGIE MILLER-STOUT,
Respondent.

No. CV07-01805-JLR-JPD

SUPPLEMENTAL MEMORANDUM OF COUNSEL REGARDING PETITION FOR WRIT OF HABEAS CORPUS

Introduction

By prior order, the court has allowed counsel to supplement Mr. Freeman's briefings. Mr. Freeman formerly was a pro se litigant to these proceedings. Counsel has now had an opportunity to review Mr. Freeman's briefings. Counsel asserts that Mr. Freeman's pro se briefings are thorough and contain thorough reference to legal authority, including on-point case law. Where relevant, counsel now supplements with only the following, which includes the most current case law on the issues addressed by this supplement, and it includes further argument.

A. THE TRIAL COURT VIOLATED MR. FREEMAN'S RIGHT TO A PUBLIC TRIAL UNDER THE 6TH AND 14TH AMENDMENTS.

In his Habeas Corpus Petition, Mr. Freeman cites to instances of his public trial right being violated. To bring as much clarity as is possible to this fundamental right of Mr. Freeman's, counsel now submits supplemental briefing on this subject matter as it pertains not just to his public trial right, but to Mr. Freeman's right to effective counsel at both the trial court level and the appellate court level.

Mr. Freeman's public trial right was violated twice during his trial. Once, just prior to the jury venire entering for the start of voir dire, the court excused all of Mr. Freeman's supporters/observers to the trial proceedings. Secondly, upon the State's motion, the court excused trial observer Aria Rozotti (not [sic] Freeman) during the examination of both Amie Freeman and Virginia Freeman.

Notably, the Washington State Court of Appeals recently addressed this issue in *State v. Sadler*, 2008 Wash. App. LEXIS 2453, ___ Wn.App. ___, ___ P.2d ___ (Docket 35021-1, 10/14/08, Div. II). In *Sadler*, the defense raised a challenge to the racial composition to the jury as a *Batson* challenge. *See Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The court relocated the parties to the jury room to address the challenge. There was no record of whether any observers attended prior to the court relocating.

The Court of Appeals noted the following precedent from *State v. Brightman,* 155 Wn.2d 506, 122 P.3d 150 (2005), and *State v. Bone-Club,* 128 Wn.2d 254, 259, 906 P.2d 325 (1995),

> Generally, to protect these important rights, before a trial court may exclude the public from the courtroom, it must conduct a five-part *Bone-Club* inquiry and determine if the closure will unjustifiably interfere with the defendant's right to a public trial.

Sadler, supra, (citing *State v. Brightman,* 155 Wn.2d 506, 514-516, 122 P.3d 150 (2005)).

The court further noted the following that was established under *Bone-Club*:

> 1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.
>
> 2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
>
> 3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.

> 4. The court must weigh the competing interests of the proponent of closure and the public.
>
> 5. The order must be no broader in its application or duration than necessary to serve its purpose.

Bone-Club, 128 Wn.2d at 258-59 (alteration in original) (quotation omitted). *State v. Sadler,* at 6, fn 12.

In the instant case, additional reference to the fact of removal exists in a brief colloquy during jury selection. *See* Exhibit A, recently supplemented 3/17/03 RP 22:3-5. In the transcript there is reference to a time when the court reflected upon the fact that the observers were removed. The prosecutor appears to have asked the court a logistical question about seating jurors in the juror box while leaving their previously occupied seats empty. 3/17/03 RP 22:3-5. The court responded to the prosecutor's question as follows:

> "That's why I told him his witnesses probably can't sit in here, because people stay in the same seats.
>
> . . .
>
> It's a lot easier for everybody to pick their people that way.

Id. at 22:3-5, 7-8.

Although the court referred to them as "witnesses," clearly the court was using to [sic] term to note the observers were witnesses to the trial proceedings as testifying witnesses were previously ordered removed during the course of trial per motions in limine. *See* Exhibit B, 2/21/03 RP 4 and Exhibit C, 2/24/03 RP 4. (discussion regarding motions in limine).

The second instance where Mr. Freeman's public trial right was violated was with regard to a specific observer. As mentioned in the Petitioner's opening Memorandum, there was also a time when, upon the prosecutor's request, the court excused observer Aria Rozotti. While discussing pre-trial matters, on March 18, 2003, the prosecutor stated, "The state would ask that during the testimony of Virginia Freeman and Amie Freeman that Ms. Aria Rozotti be excused." 3/18/2003 RP 12[1]. After discussing the existence of an anti-harassment order, defense counsel stated, " . . . in the interest of just getting this thing running through smoothly, I don't have a problem with her stepping out for that testimony." 3/18/2003 RP 14.

During a colloquy outside of the jury, the court stated the following:

> THE COURT: I will just tell everyone here, and I will tell everyone one more time, I don't care who you are here on behalf of – it doesn't matter to me if you are on behalf of

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[1] See attached excerpt from 3/18/03 RP, Exhibit D, which was previously obtained by Mr. Freeman's counsel, but which was not part of the official 3/18/03 transcript utilized during his appeal.

> the State or on behalf of defendant or simply here as a casual observer, any of those, you're welcome, you're welcome to be here, except for the lady right here, who can't be here when Mrs. Freeman testifies – the rest of you are welcome for the whole trial, but you can't talk about the case in front of anyone you don't know, or within earshot of anyone you don't know, because you might be creating a mistrial.

3/19/03 RP 189[2]. *See also* Exhibit E, Declaration of Aria Freeman.

In the present case the court's first task is to determine whether the court excluded the public from the trial. The task is, "To determine whether the trial court violated Sadler's right to a public trial, we must first decide whether the trial court's action here amounted to a closure excluding the public." *Sadler*, at 13. The court is to look at "the nature of the closure." *Id.*

In *Sadler*, the court held, "Under these circumstances the trial court's removal of the proceedings to a non-courtroom was equivalent to closing the courtroom to the public." *Sadler*, at 15.

In *In Re Orange,* 152 Wn.2d 795, 100 P.3d 291 (2004), the trial court erred when it stated the following, "I am ruling no family members, no spectators will be permitted into this courtroom during the selection of the jury because of the limitation of space, security, etcetera [sic]. That's my ruling." *Id.* at 807-808.

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[2] All transcripts or other materials referenced herein that are not attached were before the Court of Appeals during Mr. Freeman's previously filed appeal.

The *Orange* court further concerned itself with the nature of who was excluded from the trial. It noted the following, we must recognize that the trial court's ruling unequivocally excluded the defendant's friends and family from the courtroom during voir dire. *Id.*

The present situation is similar to *Orange* and the answer to the initial question is that the trial court did so exclude the public. Notably, those members of the public excluded predominantly included Mr. Freeman's family members. The statements of those excluded and the transcripts are clear that members of the public were excluded. And this exclusion amounted to public closure under applicable case law. *See* 3/18/03 RP 12-14; see also declarations of trial observers, Aria Freeman, John Freeman, Mary Freeman and Jean Freeman, Exhibits E-H.

The next inquiry is whether the trial court followed the *Bone-Club* requirements when excluding the public. Here, the analysis is obvious. The court engaged in no colloquy; it did nothing to facilitate the public's potential objections; no weighing interests occurred. *Bone-Club* requirements were nowhere close to being met. *See* 3/18/03 RP 12-14; Exhibits E-H, declarations of trial observers.

The trial court erred. The error was of both state and federal constitutional magnitude. Mr. Freeman's right to a public trial under the 6th and 14th Amendments was violated; he accordingly is entitled to a new trial.

In accordance with the above analysis, defense counsel at trial was ineffective when he failed to object to the court's removal of witnesses. To compound matters, appellate counsel was ineffective when he failed to timely file his Supplemental Assignment of Error and Brief pertaining to the public trial issue. *See* Appendix C to petitioner's memorandum in support of petition for habeas corpus, document 1-4, page 23-32 filed herein.

B. MR. FREEMAN WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL AND ON APPEAL BY TRIAL COUNSEL'S FAILURE TO OBJECT AND THE FAILURE OF HIS COUNSEL ON APPEAL TO RAISE THE MERITORIOUS CHALLENGE TO THE TRIAL COURT'S REMOVAL OF THE PUBLIC FROM HIS TRIAL.

Mr. Freeman's trial counsel went along with the motions to remove the public from his trial. 3/18/03 RP 14, Exhibit A – 3/17/03 RP 22. Appellate counsel failed to timely raise the meritorious issue challenging the trial court's erroneous exclusion of the public.

Appellate counsel appears to have filed supplemental briefing on the same day as the decision was to be made by the Court of Appeals as to the public trial issue. *See* Supplemental Assignment of Error and Brief, Appendix C to petitioner's memorandum in support of petition for habeas corpus, document 1-4, page 23-32. For obvious reasons, the court refused the issues as untimely filed.

To show ineffective assistance of counsel, a defendant must demonstrate (1) that his attorney's performance was deficient and (2) that this deficient performance prejudiced him. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984). To meet these standards, a petitioner must show that counsel's representation fell below an objective standard of reasonableness, and that there is a reasonable probability that but for counsel's unprofessional errors, appellant would have prevailed on appeal. *See In re Brown,* 143 Wn.2d 431, 452, 21 P.3d 687 (2001) ("[T]o prevail on the appellate ineffectiveness claim, [Petitioner] must show the merit of the underlying legal issues his appellate counsel failed to raise"). Appellate counsel's failure to raise a meritorious issue, one that would have resulted in the reversal of a conviction, clearly constitutes deficient performance. *In re Personal Restraint of Maxfield,* 133 Wn.2d 332, 945 P.2d 196 (1997). In *Maxwell* [sic], the Washington Supreme Court held that the petitioner was denied the effective assistance of appellate counsel where counsel had failed to adequately brief the meritorious issue that the state constitution protected his privacy interest in his electrical consumption records.

For another example, in *In re Restraint of Orange, supra,* at 814, the court held that "the failure of . . . appellate counsel to raise the issue [of the closure of the courtroom during voir dire] on appeal was both deficient and prejudicial and therefore constituted ineffective assistance of counsel."

In the case against Mr. Freeman the trial court erred when it removed the public under the circumstances documented above. Trial counsel was ineffective when he failed to object to the removal and the short-cut process used by the trial court. When appellate counsel failed to address this issue, counsel's performance was deficient because it is an obvious issue that appellate counsel should be expected to *timely* address on appeal, and the deficient performance prejudiced Mr. Freeman as he was unable to present this position to the Court of Appeals for review. Additionally, it can also be said that the Court of Appeals erred in failing to consider appellate counsel's Supplemental Assignment of Error and Brief because failing to consider it prejudiced Mr. Freeman in his right to seek appellate relief, and it was possible for the court to continue matters so the Respondent would have time to respond.

Despite appellate counsel's shortcomings, Mr. Freeman managed to adequately preserve the issue in his Pro Se statement. There, Mr. Freeman managed to address the trial court violation. Mr. Freeman is entitled to relief for this violation.

Because the issue had merit and appellate counsel failed to raise it, Mr. Freeman should prevail on his claim of ineffective assistance of counsel in his Habeas Corpus Petition.

C. THE TRIAL COURT ERRED IN ADMITTING THE ALLEGED VICTIM'S DIARY INTO EVIDENCE AND MR. FREEMAN WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN DEFENSE COUNSEL FAILED TO OBJECT DURING TRIAL TO THE ADMISSION THE [sic] DIARY.

The alleged victim in the instant case kept a diary documenting the alleged abuse she experienced from Mr. Freeman. It was filled with contents that are absolutely inadmissible in any trial court. Nevertheless, trial counsel indicated its approval of this evidence when he indicated "no objection" to its admissibility. 3/25/03 RP 572.

This matter was preserved when Mr. Freeman filed the Trial Brief of Defendant Robert Lee Freeman prior to trial. *See* Exhibit I. In that briefing, Mr. Freeman objected to all evidence acquired "on or after October 2001." *Id.* at 4. The matter was taken up at oral argument prior to trial as well. 2/27/03 RP 9-12. Therefore, it is properly the subject of habeas corpus review.

As indicated, the diary was admitted into evidence. 3/25/03 RP 572. Furthermore, its use was not limited. In fact, the prosecutor urged the jury to read the diary entries during its deliberations. 3/27/03 RP 790, 797. The prosecutor read at length from the diary's contents. 3/27/03 RP 791, 798. And the prosecutor made references to the contents of the diary. 3/27/03 RP 803.

It is appalling that defense [sic] attorney did not object to this evidence at trial. Counsel's action rose to the level of absurdity when he joined the prosecutor inviting the jury to read the diary. 3/27/03 RP 829.

As appellate counsel indicated, the diary was inadmissible under *State v. Coffey,* 8 Wn.2d 504, 112 P.2d 989 (1941). It was not admissible as a business record. *Id.* at 507. It's [sic] inadmissibility is based on the premise that it is considered a "self-serving memorandum," "self serving declaration," and has "all the vices of self-serving hearsay." *Id.* at 507. While it may have been useful for refreshing recollection, that was not its purpose in the trial of Mr. Freeman.

Admitting such a diary constitutes "reversible error." *Id.* at 508. It simply was "not admissible." *Id.* 508-509.

Counsel's failures related to the diary were inexcusable. The consent to its admissibility satisfied no legitimate strategy. All competent trial attorneys should be able to make the most of unfavorable evidence. However, when counsel consented to the diary's admissibility, he went well beyond attempting to make the most of bad evidence. He put his client in a situation that ended up being fatal to his direct appeal. Given the fact that, for reasons cited by Petitioner in his original pro se briefing, there was *NO* legitimate reason for agreeing to the diary's admissibility, counsel failed in his duty to his client. Counsel's performance was as low as is possible on a substandard performance scale. No competent strategy could have guided such a decision. And Mr. Freeman was prejudiced by counsel's deficiency.

D. MR. FREEMAN WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL BY THE FAILURE OF HIS COUNSEL ON APPEAL TO RAISE THE MERITORIOUS CHALLENGE TO THE TRIAL COURT'S DENIAL OF HIS MOTION TO SUPPRESS PHYSICAL EVIDENCE.

As indicated in a previous section of this brief, to show ineffective assistance of counsel, a defendant must demonstrate (1) that his attorney's performance was deficient and (2) that this deficient performance prejudiced him. *Strickland v. Washington, supra.* Appellate counsel's failure to raise a meritorious issue, one that would have resulted in the reversal of a conviction, clearly constitutes deficient performance. *In re Personal Restraint of Maxfield, supra.*

Within this briefing, counsel's deficiency has been previously discussed. Mr. Freeman was prejudiced by the 404(b) evidence shown throughout the diary. Because it contained numerous references to Mr.

Freeman's "bad acts," he should have been entitled to a hearing to determine the evidence's admissibility. *See* ER 404(b). It contained information regarding the witness's internet research, which imposed upon the jury a lay witnesses [sic] opinion on the allegations against Mr. Freeman. *See* Appendix A to petitioner's memorandum in support of petition for habeas corpus, document 1-3, page 13, appellant's opening brief. The diary exposed the jury to the witness' purported feelings, a violation of the prosecution's duty to refrain from inciting passion. The diary exposed the jury to the lay witness' opinion on Mr. Freeman's guilt. *Id.*

The *Coffey* case, *supra,* has been shown to illustrate the reversible nature of the admission of the diary. Under *Strickland, supra,* counsel's performance was detrimental to Mr. Freeman's defense. The performance was deficient and prejudicial.

Counsel is expected to perform competently. He is also expected to be aware of relevant law and its impact upon the case at hand. Here, counsel failed to properly educate himself in these areas. He failed to demonstrate competency to handle the necessary objections. Rather, he consented to the admission of the diary, thereby failing his client, Mr. Freeman.

Appendix

Exhibit A	3/17/08 [sic] Report of Proceedings (also contains excepts [sic] from 3/18/08 [sic])
Exhibit B	2/21/03 Report of Proceedings

Exhibit C	2/24/03 Report of Proceedings
Exhibit D	3/18/03 Report of Proceedings (excerpt)
Exhibit E	Declaration of Aria Freeman (Rozotti)
Exhibit F	Declaration of John Freeman
Exhibit G	Declaration of Mary Freeman
Exhibit H	Declaration of Jean Freeman
Exhibit I	Trial brief of defendant Robert Lee Freeman
Exhibit J	2/27/03 Report of Proceedings

DATED this 31st day of October, 2008.

LAW OFFICES OF
MONTE E. HESTER INC. P.S.
Attorneys for Petitioner

By: /s/ Lance M. Hester
Lance M. Hester
WSB #27813

[Certificate Of Service Omitted In Printing]

Honorable District Court [sic] James L. Robart
Honorable Magistrate Judge James P. Donohue

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ROBERT LEE FREEMAN, Petitioner, vs. MAGGIE MILLER-STOUT, Respondent.	No. CV07-01805-JLR-JPD DECLARATION OF ARIA FREEMAN

I, Aria Freeman, state as follows:

I attended the trial court proceedings of *State v. Robert Freeman* on March 17, 2007. I was not a witness to the case. At that time my name was Aria Rosati [sic]. I was seated in Judge McDermott's courtroom prepared to observe the initial jury selection process. However, before the jury entered the courtroom, Judge McDermott announced that there were not enough seats for the jury panel and those of us who were attempting to observe the proceedings. Judge McDermott instructed all of us who were observing to remove ourselves from the courtroom as that was the only way to allow enough room for the jury panel and the jury selection process. I cooperated with his request and remained outside of the courtroom until the parties were finished selecting the jury.

On another occasion during the same trial I was seated in the courtroom as an observer in support of Mr. Freeman when the following occurred:

The prosecutor requested I be removed from the courtroom during Virginia and Amie Freeman's testimony. I was instructed to leave the courtroom during their respective examinations. I was not given the right to object to my removal.

Because the court ordered my removal, and because the court later reminded me to leave, I remained outside of the courtroom during Amie Freeman's and Virginia Freeman's testimony.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and information.

DATED this 27 day of October, 2008 at Kennewick, Washington.

/s/ Aria E. Freeman
Aria Freeman

Honorable District Court [sic] James L. Robart
Honorable Magistrate Judge James P. Donohue

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ROBERT LEE FREEMAN, Petitioner, vs. MAGGIE MILLER-STOUT, Respondent.	No. CV07-01805-JLR-JPD DECLARATION OF JOHN FREEMAN

I, John Freeman, state as follows:

I attended the trial court proceedings of *State v. Robert Freeman* on March 17, 2007. I was not a witness to the case. I was seated in Judge McDermott's courtroom prepared to observe the initial jury selection process. However, before the jury entered the courtroom, Judge McDermott announced that there were not enough seats for the jury panel and those of us who were attempting to observe the proceedings. Judge McDermott instructed all of us who were observing to remove ourselves from the courtroom as that was the only way to allow enough room for the jury panel and the jury selection process. I cooperated with his request and remained outside of the courtroom until the parties were finished selecting the jury.

I was also present during another time during trial proceedings when I witnessed the court remove Aria Rosati from the courtroom. The removal was at the prosecutor's request; the defense attorney did not object to her removal. The court did not give Ms. Rosati the opportunity to object to her removal.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and information.

DATED this 24 day of Oct., 2008 at Maple Valley, Washington.

/s/ John B. Freeman
John Freeman

Honorable District Court [sic] James L. Robart
Honorable Magistrate Judge James P. Donohue

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ROBERT LEE FREEMAN, Petitioner, vs. MAGGIE MILLER-STOUT, Respondent.	No. CV07-01805-JLR-JPD DECLARATION OF MARY FREEMAN

I, Mary Freeman, state as follows:

I attended the trial court proceedings of *State v. Robert Freeman* on March 17, 2007. I was a witness to the case. I was seated in Judge McDermott's courtroom prepared to observe the initial jury selection process. However, before the jury entered the courtroom, Judge McDermott announced that there were not enough seats for the jury panel and those of us who were attempting to observe the proceedings. Judge McDermott instructed all of us who were observing to remove ourselves from the courtroom as that was the only way to allow enough room for the jury panel and the jury selection process. I cooperated with his request and remained outside of the courtroom until the parties were finished selecting the jury.

I was also present during another time during trial proceedings when I witnessed the court remove Aria Rosati from the courtroom. The removal was at the prosecutor's request; the defense attorney did not object to her removal. The court did not give Ms. Rosati the opportunity to object to her removal.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and information.

DATED this 24th day of October, 2008 at Maple Valley Washington.

/s/ Mary E. Freeman
Mary Freeman

Honorable District Court [sic] James L. Robart
Honorable Magistrate Judge James P. Donohue

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ROBERT LEE FREEMAN, Petitioner, vs. MAGGIE MILLER-STOUT, Respondent.	)	No. CV07-01805-JLR-JPD DECLARATION OF JEAN FREEMAN

I, Jean Freeman, state as follows:

I attended the trial court proceedings of *State v. Robert Freeman* on March 17, 2007. I was not a witness to the case. I was seated in Judge McDermott's courtroom prepared to observe the initial jury selection process. However, before the jury entered the courtroom, Judge McDermott announced that there were not enough seats for the jury panel and those of us who were attempting to observe the proceedings. Judge McDermott instructed all of us who were observing to remove ourselves from the courtroom as that was the only way to allow enough room for the jury panel and the jury selection process. I cooperated with his request and remained outside of the courtroom until the parties were finished selecting the jury.

I was also present during another time during trial proceedings when I witnessed the court remove Aria Rosati from the courtroom. The removal was at the prosecutor's request; the defense attorney did not object to her removal. The court did not give Ms. Rosati the opportunity to object to her removal.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and information.

DATED this 24 day of October, 2008 at Seattle, Washington.

/s/ Jean Freeman
Jean Freeman
/s/ Jeanette Freeman